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ABSTRACT

Federal laws, policies, and court decisions pertaining to the civil rights of minority language groups are reviewed, with an emphasis on political, legal, economic, and educational access. Areas in which progress has been made and those in which access is still limited are identified. It is argued that a continuing federal role is necessary to help remove remaining barriers for minority language citizens. Recommendations are made for coordinating government involvement in the process of assuring equal access. The texts of 18 judicial decisions bearing on access are appended. (RW)

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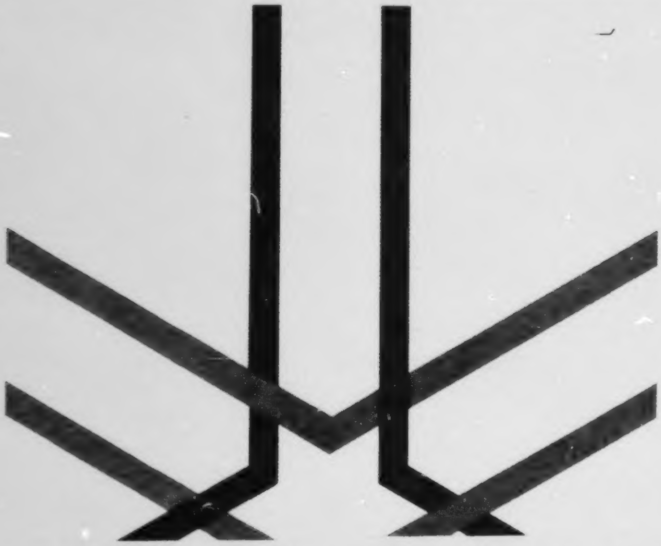
Federal Recognition of the Rights of Minority Language Groups

By Arnold H. Leibowitz



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Foreword

In *Federal Recognition of the Rights of Minority Language Groups* Arnold Leibowitz examines some of the federal laws, policies, and court decisions pertaining to the civil rights of minority language citizens in the areas of political, legal, economic, and educational access. The narrative summary points up the progress that has been made and the areas where minority language group access to full participation remains limited. The author concludes his discussion with recommendations for coordinating continued efforts to remove the remaining barriers to full participation by these groups.

Arnold Leibowitz, a constitutional attorney practicing in Washington, D.C., is special counsel to the U.S. Senate Subcommittee on Immigration and Refugee Policy. He was formerly president of the Institute of International Law and Economic Development and legal adviser to the Guam-Virgin Islands constitutional convention. From 1964 to 1966 he served as general counsel for the Commission on the Status of Puerto Rico. He holds an A.B. degree from Columbia College and an LL.B. degree from Yale Law School, and he did graduate work in jurisprudence at the University of Heidelberg. His publications include *The Bilingual Education Act: A Legislative Analysis* (National Clearinghouse for Bilingual Education, 1980), *Educational Policy and Political Acceptance: The Imposition of English as the Language of Instruction in American Schools* (Center for Applied Linguistics, 1971), and "English Literacy: Legal Sanction for Discrimination" (*Notre Dame Lawyer*, 1969). In 1979 he prepared a special report for the National Institute of Education entitled "The Official Character of the English Language in the United States."

One of the activities of the National Clearinghouse for Bilingual Education is to publish documents addressing the specific information needs of the bilingual education community. We are proud to add this distinguished publication to our growing list of titles. Subsequent Clearinghouse products will similarly seek to contribute information that can assist in the education of minority culture and language groups in the United States.

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Introduction

As an extension of the early civil rights movement, over the last several decades there has been a growing recognition of the needs and rights of minority language speakers. Awareness of the difficulties in assuring equal access at all levels of society for those of limited English proficiency has increased considerably. This volume surveys some of the legislative, administrative, and judicial steps that have been taken in the political, legal, economic, and educational arenas to guarantee these civil rights to the minority language citizen.

The chapter on political access describes the federal efforts to ensure the full participation of minority language citizens in the electoral process. From the Voting Rights Act of 1965 and its ensuing amendments, to Supreme Court decisions on voting rights cases, initiatives to eliminate barriers to effective voter access to the political system are examined.

Next, the author analyzes federal recognition of the rights of minority language citizens to equal protection and due process of law under U.S. civil and criminal codes. Included are discussions of the use of court interpreters, the issue of conducting proceedings and judicial process in a specified language, and the area of bilingual access to government or institutional services and information.

The opportunity for employment and economic advancement without discrimination on the basis of race, religion, sex, or national origin is vital to every individual. Chapter 3 addresses legislative, judicial, and regulatory remedies that remove arbitrary barriers to occupational opportunities and economic advancement for members of minority language groups. Among the issues are the use of tests and educational requirements that mask discrimination on the basis of national origin and English literacy requirements as a basis of employment.

Learning in the public school system has been a traditional means for many minorities in the United States to gain the skills and credentials that allow for greater social and economic advancement. For the minority language student, however, programs offered only in English can deny him or her equal access to that education. To overcome this disadvantage, bilingual education programs are now offered, designed to allow students to learn academic concepts in their home language while they learn a second language—English, in the case of the United States. The chapter on educational access is a brief review of some of the federal legislative initiatives in the field of bilingual education.

The narrative summary of these legislative, administrative, and judicial efforts to recognize the needs and secure the civil rights of minority language citizens is followed by the texts of the pertinent court decisions selected by the author. It is hoped that the inclusion of these texts will provide a useful reference to the historical and legal bases for improving minority language groups' access to full political, legal, economic, and educational participation in U.S. society.

Political Access

In a continuing effort to improve access to the political system through the polling place, the U.S. government—at the legislative, executive, and judicial levels—has attempted to remove barriers to minority participation. The legislative approach began with the Voting Rights Act of 1965, in which Congress directed its attention to the use of English literacy tests designed to prevent the registration and suffrage of southern Blacks. The act stated "that the right of citizens of the U.S. to vote is not denied or abridged on account of race or color." It suspended any test or device as prerequisite to voting in any state or political subdivision where such devices had been in force and where fewer than 50 percent of the eligible voters had registered or voted in the 1964 presidential election. The phrase "test or device" was defined broadly to mean any demonstration of (1) the ability to read, write, understand, or interpret any matter; (2) educational achievement or knowledge of any subject; or (3) good moral character. The federal ban on these English literacy tests or other educational prerequisites could be lifted if a state or county could prove that it had not employed such tests to deny or abridge the right to vote "on account of race or color."

The congressional decision to ban English literacy tests emerged from extensive hearings on the problem of discrimination against the southern Black voter in the administration of these tests. President Lyndon Johnson emphasized the need to address this problem in presenting the proposed legislation to Congress:

> Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to insure that right.
>
> Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negro.[1]

Congress reaffirmed this view:

> The past decade has been marked by an upsurge of public indignation against the systematic exclusion of Negroes from the polls that characterizes certain regions of this Nation. . . . Many decisions have held that such tests were not conceived as and are not designed to be bona fide qualifications in any sense, but are intended to deprive Negroes [of] the right to register to vote. The only real function they serve is to foster racial discrimination.[2]

The Supreme Court, when reviewing this legislative history in 1966, stated that the force of the act would be to permit "millions of non-White Americans . . . to participate for the first time on an equal basis in the government under which they live."[3] In upholding the key portions of the Voting Rights Act the Court said:

> The Act suspends literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases. . . . Underlying the response was the feeling that States and political subdivisions which had been allowing White illiterates to vote for years could not sincerely complain about "dilution" of their electorates through the registration of Negro illiterates. Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified White registrants.[4]

But the focus of discussion relating to obstacles to minority voting changed in March 1975 when the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights met to consider the second five-year extension of the Voting Rights Act of 1965. As expected, the first few witnesses testified on the progress in Black registration and voting made possible by the 1965 statute and on the need to continue the protections afforded by the act. There followed, however, a profusion of testimony on the obstacles facing Spanish-speaking citizens trying to exercise their right to vote.

The Civil Rights Commission reviewed the legal and practical barriers facing non-English-speaking voters, despite changes already mandated by local litigation:

> The need for minority [language] poll workers is accentuated in areas where large portions of the population do not speak English. Communication between a non-English speaker and a person who speaks only English becomes almost impossible. As a result the poll worker may become angry, the voter frustrated or embarrassed and not vote.
>
> Recent legislation in California and court orders in New York require the recruitment of bilingual poll workers, but this has not always been carried out adequately.
>
> . . .
>
> The need for adequate assistance in the voter's language is perhaps best exemplified by the situation on November 5, 1974, at the Tuba City precinct on the Navajo Reservation in Coconino County, Arizona. Since many Navajos do not speak or read English, they needed assistance in the use of voting machines and in translating the ten propositions on the ballot. Even though there were thirteen voting booths, there was only one interpreter to assist all the voters who needed help. Consequently the lines were three hours long throughout the day. Many people left without voting and indicated that they would not want to vote again because of the difficulties they encountered.
>
> Bilingual materials are needed if a non-English-speaking voter is to cast an effective ballot.[5]

The commission then recommended:

> The Department of Justice should take action to ensure [that] minority citizens whose usual language is not English receive adequate election materials and necessary assistance in their usual languages.[6]

The Department of Justice had conducted a state-by-state review of this problem, studying the changing statutory mandates and the extensive litigation that in many cases had given rise to them. The department submitted the survey during the committee hearings,[7] supporting the need to respond at the federal level to the problems of minority language groups.

The most effective testimony came from representatives of the community groups themselves, who linked voting discrimination to lack of participation in public office by minority language groups and to their failure to receive appropriate social services. Thus, Vilma Martínez, Director of the Mexican American Legal Defense and Educational Fund (MALDEF), testified:

> In 1970, of 15,650 major elected and appointed positions at all levels of Government, Federal, state and local, only 310, or 1.98 percent, were held by Mexican Americans. This result is no mere coincidence. It is the result of manifold discriminatory practices which have the design and effect of excluding Mexican Americans from participation in their own Government and maintaining the status quo. . . .
>
> Language has been a recurrent problem in qualifying to vote and in voting itself. MALDEF has brought actions alleging the unconstitutionality of English-language literacy tests in Arizona and the State of Washington. We have attacked the State of California statute which prohibited use of the Spanish language at the polling place. And in Texas, we overturned that State's prohibition on assistance to voters who could not read the ballot.[8]

Jack J. Olivero, chairman of the Board of Directors of the Puerto Rican Legal Defense and Education Fund (PRLDEF), testified similarly:

> Because of the discrimination in housing, employment, and education, most of the Puerto Rican community remains in ghettos, or *barrios*, and continues to use Spanish as their primary or exclusive language. The elective process will remain incomprehensible to the Puerto Rican community unless it is in Spanish and English. . . .
>
> Puerto Ricans who traditionally vote in great numbers on the Island are often apathetic when it comes to politics on the mainland United States. This is not a natural apathy but a result of discrimination and alienation from the political process. The use of bilingual election officials changes the hostile voting environment often faced by the Puerto Rican community. . . .
>
> The effect of the Voting Rights Act on the Black voters of this Nation has been immeasurable. We are now seeing more and more Black mayors and legislators. I would like to see the Puerto Rican voter be given these same protections and see the past discrimination remedied. Presently there is only one Puerto Rican U.S. Congressman, Hon. Herman Badillo, and only one Puerto Rican mayor, Mauricio Ferre of Miami, Florida. This picture could change dramatically if these amendments were adopted.[9]

To many on the committee, this concern was unfamiliar and unexpected. But the testimony was overwhelming. After thirty-four witnesses before the subcommittee and three days of debate in the full committee, a bill, H.R. 6219, was submitted to the full House. With minor alterations it became the Voting Rights Act of 1975 and contained two separate titles dealing with bilingual voting rights.

The 1975 amendments to the Voting Rights Act broadened the 1965 law to include the issue of discrimination against "citizens of language minorities" and banned practices denying the right of any citizen of the United States to vote "because he [or she] is a member of a language minority group."

A new congressional finding was set forth:

> The Congress finds that, through the use of various practices and procedures, citizens of *language minorities* have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily *directly related to the unequal educational opportunities* afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary *to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.*[10] [Emphasis supplied.]

The new finding was significant not only because it directed the law to minority language populations, but also because, as the stressed phrases show, Congress related the voting problems to educational discrimination. In this respect, the legislators were responding to both testimony and case law. The testimony particularly noted the political practices of Texas:

> . . . Texas does not now and never has conducted its elections in any language but English. This even though approximately one-third of the Mexican Americans in Texas, though literate in Spanish, are unable to speak, read, or write the English language. . . .
>
> . . . The school system in the State of Texas has done little if anything to prepare Mexican Americans or Blacks to compete equally with Anglos in the Texas political system. Although clearly one of the most wealthy states in the Union, Texas ranks among the lowest in funds spent on education and its record of minority educational achievement is more dismal than that found in any of the so-called "covered jurisdictions." . . . In an examination of the crucial areas of functional illiteracy and median school years completed one finds that 33.8 percent of Texas Mexican Americans are functionally illiterate while the figures for Blacks in the covered jurisdictions range from 18.4 percent in Virginia to 28.4 percent in Mississippi. A similar pattern in median school years completed finds the Mexican American in Texas at 7.2 years while Blacks in the covered jurisdictions range from a low of 7.5 years in Mississippi to a high of 8.6 years in Virginia.[11]

This testimony, largely duplicated in the House and Senate report on the bill, was also noted in the judicial cases that had not only demanded political redress for minority language groups but had also linked political and educational concerns. In *Graves* v. *Barnes* (1972) the federal district court said:

> There is no aspect of human endeavor, in general and of American life in particular, in which the ability to read, write and understand a language is more important than politics. . . .
>
> There can be no doubt that lack of political participation by Texas Chicanos is affected by a cultural incompatibility which has been fostered by a deficient educational system. If this court ignores the reason for the minimal impact of Mexican Americans . . . "it will prove that justice is both blind and dead."[12] [Citations omitted.]

Educational segregation as a factor in political isolation[13] was noted in 1972 by the Supreme Court in voting rights cases involving Mexican Americans:

> ". . . cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation, have operated to effectively deny Mexican Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the White primary."[14]

Congress suggested prescribing remedial devices related to the educational question. In addition, Congress used the precise language of the 1974 Bilingual Education Act—thus linking the political and educational concerns of minority language groups—when it said such minority citizens are from environments in which the dominant language is other than English.

The parallel with the Bilingual Education Act is seen in the sections of the 1975 Voting Rights Act that specifically require voting procedures and materials in a language other than English:

> The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.[15]

In expanding the Voting Rights Act, Congress developed two distinct triggers to identify areas with differing barriers to full participation in the political process by minority language groups. The remedies set in operation by these triggers mirror the differences in the evidentiary record on the severity of voting discrimination against minority language citizens. Title II contains the prohibition and remedies for those jurisdictions with more serious problems, while Title III imposes more lenient restrictions upon areas with less severe voting difficulties.

Title II's trigger mechanism involves the expansion of the definition of "test or device" to include "the use of English-only election materials in jurisdictions where more than five percent of the voting age citizen population is comprised of any single language minority group." A "test or device" was prohibited by the 1965 act in areas where there was less than 50 percent registration or turnout in the most recent presidential election. Since this condition is continued in the 1975 Voting Rights Act, there must be both less than 50 percent registration or turnout in a presidential election and at least 5 percent minority language group population in a jurisdiction for the Title II trigger to be activated.

Where the two criteria are met, Title II applies the 1965 act's remedies of requiring federal preclearance for all voting procedure changes and designating federal observers and examiners to serve in the covered areas. Moreover, Title II not only prohibits the triggering "test or device" in those areas, as does the 1965 act, but also mandates the implementation of bilingual election procedures. During the ten years the act is in effect, English-only elections are banned in areas under Title II coverage.[16]

Title II coverage extends to the entire states of Alaska, Arizona, and Texas, three counties in California, five counties in Florida, two counties each in the states of New York and South Dakota, two townships in Michigan, and one county each in Colorado and North Carolina. The number of jurisdictions affected in each state and the minority language groups covered are indicated in Table 1.

Title III similarly mandates bilingual election materials and information, but Title III procedures are less severe than their Title II counterparts. The bilingual election requirement is the only one borrowed by Title III; preclearance and federal examiners remain exclusively part of Title II. Although the remedies are less severe than those of Title II, Title III is more easily triggered. A state or political subdivision is brought within the

Table 1
Number of Jurisdictions Covered under
Section 4 (f) (4) of the Voting Rights Act

	Language Minority Group			
State	*Spanish Heritage*	*American Indian*	*Other*	*Total*
Alaska	—	—	22	22
Arizona	14	4	—	18
California	3	—	—	3
Colorado	1	—	—	1
Florida	5	—	—	5
Michigan	2	—	—	2
New York	2	—	—	2
North Carolina	—	1	—	1
South Dakota	—	2	—	2
Texas	254	—	—	254
TOTAL	281	7	22	310

Source: *Federal Register* 42, no. 134 (13 July 1977). Choctaw and McCurtain counties in Oklahoma were subsequently removed from coverage under Section 4(f) (4) by court order *(Counties of Choctaw and McCurtain, State of Oklahoma* v. *United States,* C.A. No. 76-1250 [D.D.C. 12 May 1978]).

purview of Title III if a single minority language group constitutes 5 percent of the total voting-age citizen population, and if the illiteracy rate of that group is greater than the national average. For purposes of this title, illiteracy is defined as failing to complete the fifth primary grade, the level at which a minimum comprehension in English ordinarily would be achieved.[17]

Differences between Title II and Title III coverage also exist in the jurisdictional level at which they are applied. Unlike Title II, Title III may cover an entire state without automatically including every political subdivision within it. In order for a smaller government unit to be covered, it must also meet the 5 percent minimum requirement; i.e., at least 5 percent of its population must be a single minority language group. If the population of a political subdivision does not contain 5 percent of the same single minority language group that triggered statewide coverage, then that subdivision is not obligated to provide bilingual election materials.

Title III's coverage is far more national in scope than that of Title II. The data in Table 2 show coverage extending to 397 political subdivisions in thirty different states. Over half the jurisdictions found to be covered under Title II are also covered under Title III with respect to the same minority language group.

It is also easier for a local jurisdiction to be subsequently released from the Title III provisions. A state seeking to exempt itself from Title III need only show that the illiteracy rate for the triggering language group has receded to a level no higher than the national average. Release from Title II, on the other hand, can only be achieved after obtaining a declaratory judgment that the state's English-only elections have not been used in a discriminatory fashion against any minority language group for ten years preceding the filing of action.

The term "language minority" or "language minority group" is not defined in educational terms but is defined racially in accordance with the Bureau of the Census classification:[18] "persons who are American Indian, Asian American, Alaskan natives, or of Spanish heritage."[19] This definition was adopted since these were the groups that were shown to have been discriminated against in voting.

> The definition of those groups included in "language minorities" was determined on the basis of the evidence of voting discrimination. Persons of Spanish heritage was the group most severely affected by discriminatory practices, while the documentation concerning Asian Americans, American Indians, and Alaskan natives was substantial.
>
> No evidence was received concerning the voting difficulties of other language groups. . . .
>
> It is not the intention of Congress to preclude other language minority groups from presenting their evidence of voting discrimination to the courts or to the Attorney General for appropriate relief.[20]

The definition was adopted also because of the emphasis on race and color in the 1965 act and because of the question—which remained un-

Table 2
Number of Jurisdictions Covered under Section 203 (c) of the Voting Rights Act

	Language Minority Group			
State	*Spanish Heritage*	*American Indian*	*Other*	*Total*
Alaska	—	—	14	14
Arizona	14	4	—	18
California	38	1	1	40
Colorado	34	1	—	35
Connecticut	1	—	—	1
Florida	6	1	—	7
Hawaii	—	—	4	4
Idaho	1	1	—	2
Kansas	3	—	—	3
Louisiana	1	—	—	1
Maine	—	1	—	1
Michigan	8	1	—	9
Minnesota	—	2	—	2
Mississippi	—	1	—	1
Montana	—	7	—	7
Nebraska	1	1	—	2
Nevada	3	2	—	5
New Mexico	32	5	—	37
New York	3	—	—	3
North Carolina	—	4	—	4
North Dakota	—	5	—	5
Oklahoma	2	23	—	25
Oregon	1	1	—	2
South Dakota	—	7	—	7
Texas	143	—	—	143
Utah	2	2	—	4
Virginia	—	1	—	1
Washington	4	1	—	5
Wisconsin	1	3	—	4
Wyoming	4	1	—	5
TOTAL	302	76	19	397

answered—of whether being Spanish surnamed or of Spanish heritage made one a member of a particular "race" under the Fifteenth Amendment. Although the Civil Rights Commission and the Department of Justice argued that it did, the statute as passed expanded the authority on which Congress was acting to include the Fourteenth Amendment.

The constitutional basis for remedial action for minority language groups is still debated. It has been raised specifically with respect to the use of an at-large voting pattern to dilute the voting rights of minority language groups. The Fifth Circuit Court of Appeals held in *U.S.* v. *Uvalde Consolidated Independent School District*[21] that such a voting procedure is banned by the 1975 Voting Rights Act. The decision was based on the statutory language and legislative history, which had relied on the Fourteenth Amendment. The court noted that if "groups identifiable only by linguistic characteristics are not race or color groups, . . . Congress has no Fifteenth Amendment authority to legislate for their protection." In addition, the plurality opinion in *City of Mobile* v. *Bolden*[22] had suggested that "the Fifteenth Amendment applies only to practices that directly affect access to the ballot" and is, therefore, not relevant to cases involving at-large districting.[23] The Fifth Circuit interpreted the 1975 amendments broadly: "In 1975, a central concern of the Congress was the need to protect language minority groups from practices that deprived them of equal political participation. . . . The Congress specially invoked Fourteenth Amendment authority for the extension designed to alleviate the problems faced by Mexican American voters in exercising their votes."[24]

The issue had arisen with respect to the applicability of the 1975 Voting Rights provisions to a local school board election. The Fifth Circuit followed previous voting rights cases in saying:

> In our opinion Congress intended to forbid racial, color, and language minority discrimination in all of the myriad elections reached by Section 2. The legislative history of the 1975 amendments to the Act not only emphasizes the discriminatory use of at-large districting to dilute the votes of Mexican Americans, but focuses in particular on the use of such districting plans by Texas school boards.[25]

The 1975 Voting Rights Act amendments were foreshadowed by a series of court cases that had challenged the constitutionality of English literacy tests given to voters literate in other languages and that were cited a number of times during the congressional hearings.

In *Cardona* v. *Power*,[26] decided in 1966, the appellant, literate in Spanish but not in English, challenged the New York State English literacy test, as a condition of suffrage, as violative of due process and equal protection. The U.S. Supreme Court could not determine from the record whether the appellant was covered by a special provision of the Voting Rights Act of 1965 (discussed below) that had been passed after the case was initiated. The Supreme Court, therefore, remanded for fuller development of the record. But the Court went further and questioned whether—even if it should be found that the appellant was not within the coverage of the Voting Rights Act—New York would wish to continue its English literacy requirements in view of the congressional intention set forth in the act.[27]

Justices Douglas and Fortas, dissenting from the refusal of the Court to decide the case, felt there was no rational basis—considering the importance of the right at stake—for denying the franchise to those with equivalent literacy qualifications. They would have given the appellant, quite apart from any federal legislation, a constitutional right to vote in New York on a parity with an English-speaking citizen—either by providing a Spanish literacy test in place of the English one in her case, or by a certificate showing completion of the sixth grade in a school in Puerto Rico.[28] Justice Douglas, who wrote the dissenting opinion, noted his doubt whether literacy was a useful prerequisite to the exercise of the franchise, but he did not question the state's constitutional right to set such a limited standard. What he did say was that a literacy test restricted to English was constitutionally unfair since it placed a "heavier burden" on the Spanish-speaking U.S. citizen. Justice Douglas stressed the point that the right to vote is a "fundamental matter in a free and democratic society," and for that reason "a far sterner test is required when a law—whether state or federal—abridges" such a right.[29]

In *Castro* v. *State of California*[30] the California Supreme Court sitting *en banc* in 1970 followed the U.S. Supreme Court's suggestion in *Cardona* and struck down as violative of the equal protection clause the California English literacy requirement when applied to voters literate in Spanish. Later, other courts, following the reasoning of *Castro* and Justice Douglas in *Cardona,* went further in their remedial orders, requiring voting materials in Spanish where the voters did not understand English.[31] Congress, then, in the 1975 Voting Rights Act amendments, fashioned remedies already put forth and tested in the courts.

As *Cardona* indicated, the Puerto Rican voters who came to New York were especially handicapped by the English literacy requirements, having been educated in Spanish-language schools in Puerto Rico. Section 4(e) of the Voting Rights Act of 1965 had taken special cognizance of the impact on Puerto Rican voters of English literacy tests. This section, a harbinger of the 1975 concern with minority language groups, was introduced by Senator Robert Kennedy and supported by Senator Jacob Javits. It provided that:

> No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language. . . .[32]

In sum, Section 4(e) suspended the state English literacy tests if the voter had completed the sixth grade in a U.S. school where the language of instruction was other than English.

The Supreme Court in *Katzenbach* v. *Morgan,*[33] with Justices Harlan and Stewart dissenting, held Section 4(e) constitutional, saying it fell within the federal enforcement powers of the Fourteenth Amendment. The Court reasoned that Congress might have decided that the application of New York's English literacy requirement in order to deny the vote to a person with a sixth grade education in Puerto Rican schools constituted invidious discrimination in violation of the equal protection clause.[34] The Court

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confined its examination to whether there could have been any factual basis to sustain such a congressional judgment; it referred only briefly to the sociological data—which had been discussed at some length by the lower courts[35]—in citing the existence of Spanish newspapers, radio broadcasts, and television programs in New York. These could have provided a possible basis for the congressional judgment that an English literacy test was no longer necessary to ensure an informed electorate and now had a primarily discriminatory effect.[36] Also, the Court stressed the importance that Congress could have attached to the right to vote—a right vital to Puerto Ricans seeking equal participation in other areas of public life.[37] This view of the vote as a method of bringing equality in social services was, of course, the position later taken by Congress in the 1975 amendments to the Voting Rights Act.

The Supreme Court holding thus went beyond the decision in a companion case in the lower courts which had been limited to Puerto Ricans. In *United States* v. *Monroe County Board of Elections*,[38] the federal government applied for a temporary restraining order against the full application of the New York State constitution's literacy requirement[39] and an order requiring the board of elections to register all persons who could qualify as voters under Section 4(e). The United States District Court for the Western District of New York, sitting as a three-judge court, unanimously upheld the constitutionality of Section 4(e), but it did so on the basis of the territorial clause[40] and the Fourteenth Amendment in relation to Puerto Rico only.

> We conclude, therefore, that because of the sui generis circumstances present in the instant case, Congress could correct, under its general Fourteenth Amendment powers that which tended to dilute and frustrate a course and policy it had deliberately followed for so long, in upgrading the people of the Island of Puerto Rico to full and complete American citizenship.[41]

The Supreme Court's rationale permitted Congress to go beyond the special case of Puerto Rico in responding to the problems of minority language groups in the United States. Congress understood this.

> The *Morgan* case has enormous significance for the bill now before us. The Court approved the exercise of congressional power to enfranchise language minorities who are being denied the right to vote because of their inability to read or understand English. In that instance, Congress suspended the New York State statute requiring ability to understand English as a prerequisite for voting as it applied to Puerto Rico residents. Later litigation under that section held that New York must provide bilingual election materials, as well as allow Spanish-speaking Puerto Ricans to vote. . . .
>
> H.R. 6219 is merely an extension of the legislative and constitutional principles approved by the Supreme Court. . . . Unlike the provision sustained in *Morgan*, which was limited to one group, this bill would enfranchise four language minorities: persons of Spanish heritage (including Puerto Ricans), American Indians, Alaskan natives, and Asian Americans. These are the groups which, the

> evidence shows, have been subjected to voting discrimination. In suspending English-only elections this bill does no more than the statute upheld in *Morgan*. In applying the special remedies of the present Act through Title II, H.R. 6219 does no more than the law validated in *South Carolina* v. *Katzenbach*. And in mandating bilingual elections, it affords a remedy implicit in the provisions sustained in *Morgan*, and required by later court decisions.[42]

In 1970 Congress amended Section 4(e) to drop the sixth grade schooling requirement and came close to covering the *Cardona* situation.[43]

The implementation experience of the Voting Rights Act with respect to minority language groups is still limited. A recent survey conducted by the Federal Election Commission (FEC)[44] found that locally based planning for the delivery of bilingual voter services was at a very low level. Cooperative planning and preparation involving consultation with local minority language groups was minimal. The commission concluded that election officials in many jurisdictions did not appear to be making maximum use of available census and other statistical information on the distribution of minority language populations. In assessing the need for bilingual services, the commission found that many administrators relied improperly upon the proportion of registered voters who are minority language citizens or on the actual demand on election day for minority language materials or oral assistance. The commission recommended that administrators be made aware of the need to go beyond such methods of assessment and of the need for more extensive cooperation with local community organizations in planning and delivering bilingual voter services.

But the FEC's most significant finding was that there had been insufficient efforts to register members of minority language groups who were eligible to vote. Thus, the most important barrier to the political participation of minority language citizens—registration—had been largely ignored. The commission believed this was the area of greatest need for these potential voters, and an area in which local election administrators were least willing or least able to invest efforts. To remedy this the commission recommended closer coordination with local community groups. Registration, the FEC maintained, was one area where volunteers, interested parties, and organizations could contribute effectively to increasing electoral participation, going beyond a monitoring role on election day.

The commission's one positive finding was the widespread availability of bilingual oral assistance, an approach emphasized by the Justice Department's implementation guidelines.[45] Nevertheless, the FEC felt that deployment of bilingual polling place personnel was all too often a matter of chance rather than of careful design. Local administrators were less scrupulous than they should have been about the linguistic competencies of polling place personnel whose function was to provide bilingual oral assistance to non-English-speaking voters. Until more care was devoted to systematic and effective placement of bilingual precinct board members, and until there was proper insistence upon adequate qualifications and training for such personnel, the commission felt that the benefits of providing oral assistance at the polls were not likely to be fully realized.

The commission's survey found that printed materials were available in the minority language as well as English. However, faulty translations, poor distribution methods, and inadequate publicity concerning the availability of these materials limited their effectiveness.

Nevertheless, the commission's pressure and the force of the 1975 amendments to the Voting Rights Act apparently made a substantial difference in the registration of Spanish heritage Americans in the 1980 election. The states with the largest number of counties covered by the language minority provisions are Arizona (covered statewide by Section 4), California, Colorado, New Mexico, and Texas. In 1980, 56.7 percent of age-eligible Hispanics registered in those five states, an increase of 44 percent over the 1976 figures.[46]

This brief review of legislative, executive, and judicial initiatives in the area of voter access to the political system shows that in the more than fifteen years since passage of the Voting Rights Act of 1965, the range of minorities aided and the scope of remedies suggested has grown considerably, with increasing attention being focused on the barriers encountered by minority language citizens. From the initial stages of voter registration to the actual balloting on election day, the drive for equal access to the political arena for all citizens continues.

* * *

Note: In June 1982, Congress passed and the president signed into law a twenty-five year extension of the Voting Rights Act. The minority language provisions were left intact in the new legislation.

Legal Access

In the criminal justice system the recognition of the special needs of those with limited English skills has arisen, but without the same statutory reference to minority language groups found in the political system. Again, the issue first surfaced sporadically in case law and then received more general treatment in federal legislation. Lower federal courts held that the selection of a grand jury based upon English literacy might be a violation of due process of law,[47] a position consistent with the Voting Rights Act cases a few years later. The finding in another federal case, *United States ex rel Negron* v. *New York,*[48] was that a defendant with a severe language difficulty had the right to a translator at state expense. In practice, a number of federal courts had already begun to use interpreters in criminal trials.[49]

The Court Interpreters Act of 1978[50] generalized upon this ruling and provided for the use of interpreters in United States courts. The act requires the services of an interpreter in any criminal *or civil* action initiated by the United States in a U.S. District Court where a party or witness "speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer or so as to inhibit such witness' comprehension of questions and the presentation of such testimony."[51] The director of the Administrative Office of the United States Court "in those districts . . . where it [is] advisable" may also authorize the full-time employment of certified interpreters.[52]

Earlier versions of the act would have granted greater formal recognition to minority language groups. The Senate version, the Bilingual Courts Act,[53] would have established bilingual judicial districts where "at least 5 percentum or 50,000 of the residents of that district, whichever is less, do not speak or understand the English language with reasonable facility," a standard similar to that of the Voting Rights Act of 1975.

Legislation has been introduced[54] in the last several sessions of Congress[55] seeking a major language change in the operations of the Federal District Court in San Juan, Puerto Rico. It would permit the filing of pleadings in Spanish or English and the conduct of trials in Spanish if the court decided that it would be appropriate.[56] At present, the Federal District Court is required to conduct its proceedings and judicial process in English. The

English-language requirement was first imposed in the Foraker Act of 1900[57] and is seen now as a vestige of the explicit attempt to "Americanize" the island.[58] The requirement has acquired a high degree of symbolism in the internal political debate over the status of Puerto Rico.[59] Both statehood advocates and supporters of continued commonwealth status have argued for its elimination, although the federal judges in Puerto Rico have resisted this,[60] as has the First Circuit.[61]

The proposed legislation would permit the use of Spanish in criminal cases if the defendants requested it, in civil cases where both parties agreed to use it, and "in the interest of justice" at the court's own initiative. The commonwealth's judges, bar association, and organized legal groups support the suggested change, but federal judges in Puerto Rico and in the First Circuit have expressed concern at both the administrative burden and the cost of such a change. The legislation has passed in the House but has never been favorably reported out of the Senate Judiciary Committee. The future of the legislation remains unclear at this writing.

Problems of legal access go beyond just the court system, of course, to cover the full range of government services. Prior to *Lau* v. *Nichols* (1974), the Supreme Court case upholding the right under Title VI for compensatory instruction where elementary school children did not understand English, lawsuits seeking bilingual government services rested their claims exclusively on constitutional grounds and were uniformly unsuccessful. In *Carmona* v. *Sheffield*[62] and *Guerrero* v. *Carleson*,[63] both California cases, the courts rejected the proposition that to provide national origin minority groups with notices they could not understand ran afoul of the Fourteenth Amendment. By presuming that non-English-speaking persons will be assisted by bilingual "volunteers," the courts reached a determination that English-only notices are reasonable and do not violate the due process clause.[64]

Underlying the *Carmona* and *Guerrero* decisions was the fear that accommodating one group opens the floodgates to all language groups pressing their demands for services in their own languages, wreaking administrative chaos. The *Carmona* court wrote:

> In essence, plaintiffs' contention would require the State of California and, presumably, all other States and the Federal Government to provide forms and to conduct (their) affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the Courts, and administration agencies, would become all but impossible. The application of Federal and State statutes, regulations, and proceedings would be called into serious question.[65]

But plaintiffs relying on the Civil Rights Act of 1964 have been almost always successful in similar situations. In *Pablon* v. *Lavine*[66] the Federal District Court ruled that a federally funded agency administering an unemployment insurance program exclusively in English violates Title VI and applicable regulations if the result is that substantial numbers of non-English-speaking persons receive fewer benefits than their English-speaking counterparts. The plaintiff, a non-English-speaking Puerto Rican, had lost his right to appeal an adverse decision of an unemployment insurance referee because he could not comprehend the thirty-day appeal notice written in English. Comparing the HEW regulation cited in *Lau* to those applicable to the New York State Unemployment Insurance System, the court noted that the U.S. Department of Labor had identical regulations.[67]

The issue has been decided similarly in the area of welfare rights. In *Sánchez* v. *Norton*,[68] Hispanics claimed denial of equal access to Connecticut's welfare system and sought bilingual forms, notices, and personnel. The court ruled:

> Whether viewed in the context of an "invidious classification" under the Equal Protection Clause [citations omitted], or as viable causes of action under Title VI of the Civil Rights Act, see *Lau* v. *Nichols* . . . (1974), the plaintiffs' allegations are sufficient to survive pre-trial dismissal.[69]

Kuri v. *Edelman*[70] is the only federal court ruling against the minority language petitioners in the area of access to government services. In affirming the lower court's refusal to order bilingual welfare termination notices, the Seventh Circuit Court distinguished this case from *Lau* on the grounds that the petitioners sought no specific remedy, and noted that informal procedures were available to welfare recipients in Hispanic neighborhoods to allow plaintiffs to comply with the rules of the Illinois Department of Public Aid.[71]

The Equal Employment Opportunity Commission (EEOC) has been more consistent in requiring bilingual notices and activities—extending the requirement to nonpublic organizations as well. The commission held, for example, that a labor union comprising from 42 percent to 52 percent Spanish-surnamed Americans exhibited national origin bias when it printed its constitution, bylaws, and collective bargaining agreements solely in English.[72]

In the area of legal access, then, the various sectors of government have come to recognize the multilingual nature of contemporary U.S. society. With more minority language speakers as clients, institutions are beginning to be expected to provide information and services in languages other than English, thus assuring that these clients have equal access and protection.

Economic Access

Access to employment—the opportunity to hold a job—is probably one of the most basic questions facing any individual or minority group. Title VII of the Civil Rights Act of 1964 as amended[73] makes it unlawful for an employer (defined as including local government, union, employment agency, or apprenticeship committee) to set terms or conditions of employment that discriminate on the basis of "race, color, religion, sex, or national origin." In the leading case of *Griggs* v. *Duke Power Company,*[74] the U.S. Supreme Court held that Title VII requires "the removal of all artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[75] The Supreme Court went on to hold that since Duke Power's testing and educational requirements had been shown to disqualify Blacks at a substantially higher rate than Whites, the company had the burden of showing that each of these requirements "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[76] Generalizing from Griggs, an "impact" situation exists whenever an employer, union, employment agency, or apprenticeship committee maintains a policy or practice that can be shown to have a "differential impact" upon the employment opportunities of a class protected by Title VII. If the respondent cannot then show that the differential impact of its policy is justified by business necessity, maintenance of the policy constitutes discrimination.

The Equal Employment Opportunity Commission, established to enforce Title VII, has been particularly sensitive to "neutral" tests that mask discrimination on the basis of national origin. English-language tests were singled out in its regulations.

> 1606.1 Guidelines on discrimination because of national origin.
> (a) The Commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination. The bona fide occupational qualification exception as it pertains to national origin cases shall be strictly construed.
>
> (b) . . . the Commission will . . . examine with particular concern . . . the use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed. . . .[77]

English literacy has been imposed as a condition of employment in certain fields to restrict the economic participation of certain ethnic groups. Most of the statutory English literacy restrictions on occupational opportunity arose from 1890 to 1920 and were part of the legislation proliferating in the United States at that time, reflecting a bias against immigrants and minority groups that was exacerbated by the depression of 1913-1914.[78] English literacy requirements ranged widely and were aimed specifically at areas non-English-speaking minorities were entering. Shrimp processing plants and wholesale dealers,[79] prison keepers,[80] and pawnbrokers[81] all had English-language requirements imposed upon them; New York State went so far as to require barber examinations in English.[82]

The only Supreme Court case raising language issues in the economic area was heard before World War II. In *Yu Cong Eng* v. *Trinidad*[83] the Court touched upon the reasonableness of English literacy as a condition for operating a given business, and found the English-language requirement to be a mask for racial discrimination. The Filipino legislature had passed what was popularly known as the Chinese Bookkeeping Act, which made it unlawful for any person or business entity in the Philippines to keep account books in a language other than English, Spanish, or any local dialect. The appellant was a Chinese merchant who argued that the act would effectively drive him, as well as 12,000 other Chinese merchants, out of business. The Filipino government argued that the law was primarily a tax measure reasonably designed to permit the effective collection of taxes. The Court overturned the law.

> In view of the history of the Islands and of the conditions there prevailing, we think the law to be invalid, because it deprives Chinese persons—situated as they are, with their extensive and important business long established—of their liberty and property without due process of law, and denies them the equal protection of the laws.[84]

The determination of when the English-language requirement is job related—a necessary business condition—or when it is a surrogate for national origin discrimination, as in the *Yu Cong Eng* case, is still the subject of litigation before both the EEOC and, to a lesser degree, the courts. The Equal Employment Opportunity Commission has been a consistent opponent of the English-language requirement. The commission found that the requirement that "agricultural products processors read, write, and speak English" unlawfully foreclosed employment opportunities to Spanish-surnamed workers.[85] It also found that a state insurance agency was engaging in unlawful employment discrimination based on national origin by requiring that agents selling life and disability insurance pass an examination administered only in English, after a finding that the examination had a disparate effect on Spanish-surnamed Americans.[86]

Other, less formal, work requirements bearing on language have similarly been struck down. Thus, the EEOC found discrimination on the basis of national origin in a rule barring use of the Spanish language during nonworking time[87] and struck down as not required by business necessity a similar rule against barbers' speaking to each other in Spanish in the presence of English-speaking patrons.[88] The commission summed up its view as follows:

> The refusal to permit a Spanish-surnamed American to speak Spanish adversely affects him with respect to terms and conditions of his employment because of his national origin. In the absence of a showing by respondent that this policy is required by business considerations, the policy is unlawful.[89]

Judicial decisions have been very few in the economic area and less sympathetic than the EEOC on the question of discrimination on the basis of language requirements in business. In *Frontera* v. *Sindell*[90] (1975) the U.S. Court of Appeals for the Sixth Circuit held that a civil service carpentry test given by the city of Cleveland and conducted in English did not constitute a violation of the Fourteenth Amendment. Although the leading case to hold against the rights of a Spanish-speaking plaintiff, the court's holding in *Frontera* was very limited in application. The court emphasized that "the examination did not require a general proficiency in the English language. It used words and terms which ordinarily would be recognized and understood by a person knowledgeable in the carpentry trade. . . . At the very least use of such terminology would not interfere with the test's objective of identifying competent carpenters and ranking them for civil service."[91]

The significance of the case is also limited by the fact that it was not brought under Title VII of the Civil Rights Act—the statutory authority that is the basis of the EEOC actions—and the court noted that its holding did not consider any violation of that statute but rather solely the constitutional question. Although this was by no means certain, there was general agreement that to find a violation of a constitutional right, intent to discriminate on the part of the employer must also be proved, while a Title VII violation could be proved simply by showing a disparity of result, whether intended or not.

But the Sixth Circuit Court of Appeals also engaged in reasoning that went beyond these limiting facts and that went contrary to other cases and the EEOC approach. The Supreme Court had stated that where a classification is based on alienage, nationality, or race it is "inherently suspect and subject to close judicial scrutiny."[92] Nevertheless, the Sixth Circuit Court suggested a more limited, distant standard of review of the Cleveland Civil Service Commission's action. "The District Court in determining the obligations of the Commission should have applied the rational basis test rather than the compelling interest test. . . ." The court went on to distinguish Justice Stewart's comment in *Dandrige* v. *Williams*, "it is not enough that the State's action be rationally based and free from invidious discrimination." The court concluded that "this is not a proper case in which to subject state action to strict judicial scrutiny. . . . We are not dealing here with a suspect nationality or race."[93]

The court then presented its views of the role of the English language in the United States, expressing one of the strongest statements ever made about an official role for English:

> It cannot be gainsaid[94] that the common, national language of the United States is English. Our laws are printed in English and our legislatures conduct their business in English. Some states even designate English as the official language of the state, e.g., 127 Ill. Rev. Stat. §177. Our national interest in English as the common language is exemplified by 8 U.S.C. §1423, which requires, in general, English language literacy as a condition to naturalization as a United States citizen.
>
> Statutes have been enacted which provide exceptions to our nation's policy in favor of the English language to protect other interests and carry out the policies of the Fourteenth Amendment, but these exceptions do not detract from the policy or deny the interests the various levels of government have in dealing with the citizenry in a common language.[95]

In *García* v. *Gloor*[96] the Fifth Circuit addressed an English language requirement challenged under Title VII of the Civil Rights Act and held that it did not constitute national origin discrimination. In that case the employer required all bilingual employees to speak only English on the job. Although there was a combination of factors leading to García's discharge, the court assumed that violation of the English language rule was a substantial basis for his discharge and that its adoption was arbitrary and *not* related to a genuine business need. Nevertheless, the court held, "Neither the statute nor common understanding equates national origin with the language that one chooses to speak."[97] But the court was careful to limit the extent of its holding:

> Our opinion does not impress a judicial imprimatur on all employment rules that require an employee to use or forbid him from using a language spoken by him at home or by his forebears. We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin *as applied to a person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule.*[98]

The *Frontera* v. *Sindell* decision notwithstanding, the Equal Employment Opportunity Commission has continued to follow its civil rights guidelines[99] and question English-language testing[100] and speaking requirements where there is no business necessity.[101]

Affirmative action programs in the civil service seek to remedy past discrimination against minorities in hiring. However, minority language speakers or those with limited English proficiency have not been included in these programs as yet.

The EEOC is responsible for affirmative action planning in the federal government, an area once the province of the Civil Service Commission (now the Office of Personnel Management). In December 1979 the EEOC, pursuant to Section 717 of the Civil Rights Act of 1964 and the Civil Service Reform Act of 1978, issued instructions[102] to federal agencies for the development of 1980 affirmative action plans. The Civil Service Reform Act requires the Office of Personnel Management to "implement a minority recruitment program which shall provide . . . that each Federal agency conduct a continuing program for the recruitment of members of minorities for positions in the agency . . . in a manner designed to eliminate under-representation of minorities in the various categories of Civil Service employment within the Federal service. . . ."[103]

The EEOC approach to affirmative action ignores the issue of minority languages. It requires work force reports in terms of race, sex, and national origin—referring to American Indian, Asian/Pacific Islands, and Hispanic groupings—but it assumes the propriety of English examinations if job related. Special training is suggested to assure that the affirmative action program is carried out, but there is no reference to the language of instruction. There are, however, recognition of non-English language skills and a suggestion that "knowledge of a language other than English" may be an appropriate reason for a quality ranking and selective placement.[104]

The EEOC affirmative action requirement is part of a general questioning of federal examination and selection procedures. The long-standing Federal Service Entrance Examination (FSEE) was challenged as racially discriminatory,[105] and after a court determination that federal employment practices were subject to the same standards as those in the private sector, the Civil Service Commission discontinued the FSEE and set up the Professional and Administrative Career Examination (PACE). This, too, has been subject to challenge in the judicial,[106] executive,[107] and legislative[108] branches.

The revised consent decree in the *Luevano* v. *Campbell* case required the immediate suspension of PACE as a criterion for promotions, replacement of PACE within three years by job-related exams to be developed by each of the agencies, and special efforts to assure hiring of Black and Hispanic applicants. The focus of special hiring efforts includes:

> any PACE jobs if interaction with the public or job performance would be enhanced by having bilingual and/or bicultural skills. Upon request of an agency, OPM examining offices will issue a list of the names and addresses of PACE eligibles who indicate on their application proficiency in the Spanish language, and are also proficient in the use of English. Agencies will then be authorized to offer appointment to any eligible on that list without further reference to test score or rank on the PACE register, provided the following conditions are met: (a) the job is covered by this program . . . and (b) the agency has determined through use of a reasonable questionnaire or interview that the applicant to whom appointment is to be offered has the required level of oral Spanish language proficiency and/or the requisite knowledge of Hispanic culture. Agencies must maintain documentation that these requirements have been met.[109]

Although the data indicated a higher than normal rate of failure for Hispanics, a fact of critical importance in the *Luevano* v. *Campbell* case,[110] there was no recognition of the problem of those with limited English proficiency.

Other statutes that have focused upon minority groups have usually done so in terms of national origin, but two statutes were notably broader. The Comprehensive Employment and Training Act (CETA) specifically focused on "persons with limited English-speaking ability"[111] without defining these persons further. Native Americans were specifically mentioned[112] but the Spanish surnamed were not. The Public Works Employment Act of 1977,[113] as amended, contained a provision that at least 10 percent of the authorized $4 billion of federal funds be expended for minorities. For the purposes of the statute, minority group members are citizens of the United States who are Black, Spanish speaking, Oriental, American Indian, Eskimo, or Aleut.

These two exceptions notwithstanding, it can be said that efforts to actively increase access of minority language speakers to the economic system have not received the same degree of attention and action from the government as similar efforts in the political and legal realms.

Educational Access

The Bilingual Education Act of 1968, as amended, addresses the academic problems of children of "limited English proficiency." This term refers to individuals (1) who were not born in the United States or whose native language is other than English; (2) who come from a home environment where a language other than English is dominant; or (3) who are either American Indians or Alaska Natives and come from an environment where a language other than English has had a significant impact on their level of English proficiency. These individuals are embraced by the provisions of the act if for the above reasons they have had sufficient difficulty speaking, reading, writing, or understanding the English language to deny them the opportunity to learn successfully in classrooms where the language of instruction is English.[114] The act provides for the establishment of bilingual education programs through financial and technical assistance to districts and state educational agencies seeking to develop such programs.

Other federal educational programs[115] direct themselves less specifically to the needs of minority language groups. However, the difficulties faced by minority language groups are often addressed in the course of implementing the general mandates of these programs. The bilingual vocational training programs[116] relate to this most closely. For example, in the 1976 amendments to the Vocational Education Act of 1963, Congress added limited-English-speaking persons to the list of groups considered disadvantaged and thus part of the "20 percent disadvantaged set aside," which required states to spend that portion of their funds on the disadvantaged. This went beyond the previously created discretionary programs for bilingual vocational training.

The purpose of bilingual vocational training programs is to provide people who have left or completed elementary or secondary school, and who are unemployed or underemployed because of their limited English-speaking ability, with training that will enable them to enter the labor market. Bilingual vocational training programs provide training in both English and another language, so that trainees may acquire sufficient competence in English to perform satisfactorily in a work situation. The English instruction in the projects is closely related to the jobs for which these people are being trained. The projects to date range over five languages (Spanish, French, Chinese, Indian, and Chamorro) and cover

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cooking, paralegal, dental and medical assistance, auto mechanics and machinery, various kinds of repair work, and agricultural work.

The Adult Education Act[117] provides federal assistance for the establishment of state-administered programs of adult education for all individuals sixteen years of age and older who have not completed high school (or its equivalent) and who are not currently enrolled in school. Amendments passed in 1974 provide for bilingual adult education programs for those who come from environments where a language other than English is dominant and who for that reason have difficulty speaking and understanding instruction in English. The act states that bilingual adult education programs shall be provided by state education agencies (SEAs).

Also linked to bilingual education programs is the statute providing special programs for students from disadvantaged backgrounds.[118] Programs conducted under this authority have the common goal of identifying and delivering services to a variety of disadvantaged youth and students at the secondary and postsecondary levels so as to assist them to begin, continue, or resume programs of postsecondary education. Amendments passed in 1974 authorize the special programs to include students with limited English-speaking ability who are enrolled or accepted for enrollment at an institute of higher education (IHE) that has a Special Services for Disadvantaged Students project. The amendments also require projects serving these students to provide instruction and support services in English. The statute broadly defines the disadvantaged for this program as financially, culturally, and educationally disadvantaged students, those with physical handicaps, and those of limited English-speaking ability. Limited-English-speaking students may be eligible for the special programs, but participant eligibility requirements do not include limited English-speaking ability. The regulations for these programs state that projects may not serve an exclusively limited-English-speaking clientele. Projects may design components for the limited English speaking but the overall project design must be developed for students from low-income backgrounds, those with physical handicaps, or those living in severe rural isolation.

A number of acts are relevant to minority language groups from the point of view of eliminating minority group segregation. Under Title IV of the Civil Rights Act of 1964, as amended, financial assistance is made available for technical assistance, training institutes, and grants to school boards in connection with the desegregation of public elementary and secondary schools. "Desegregation" means the assignment of students to and within public schools in a manner that will provide all students with an equal opportunity for effective participation in education programs, despite any English language deficiencies resulting from environments in which the dominant language is other than English.

The National Origin Desegregation Assistance, or "Lau," Centers (NODACS) are funded under this act. These provide resources for desegregation assistance relating to English-language-deficient students,[119] assessing the needs of students, special curriculum development, and new administrative devices in the school system. The centers work with school districts in an advisory capacity, addressing specific problems which may emerge and require specialized assistance. The centers either provide the necessary training or assist the district's supervisory staff in their training activities.

Conclusion

This survey of the law regarding minority language group access in the political, legal, economic, and educational arenas points to progress that has been made and areas where access is still limited. In the view of the author, a continuing federal role is needed to help remove the remaining barriers. The following recommendations seek coordination and rationalization of the government's role in this process. They could be implemented by the Office of Bilingual Education and Minority Languages Affairs or some other designated federal agency.

Political Access:

1. Coordinate and monitor education efforts in those states and local political subdivisions that have been found subject to Title II or III of the Voting Rights Act of 1965, as amended. Direct bilingual education funds and right-to-read and other nonformula funds to those areas.
2. Review for maximum clarity all non-English political materials provided by states to assist language minorities. Assist adult education agencies using these materials to support increased voting by language minorities.
3. Maintain close coordination with the Federal Election Commission.
4. Develop standards to define "language minorities" as used in the amendments to the Voting Rights Act, perhaps relating the definition to that of "limited English proficiency" found in the Bilingual Education Act rather than the Bureau of Census national origin definitions.
5. Coordinate with the Title VI Office of the Department of Education and the Commission on Civil Rights the careful monitoring of educational desegregation efforts, to correlate them with political participation.

Legal Access:

6. Maintain close coordination with the U.S. Department of Justice, U.S. Civil Rights Commission, and International Association of Chiefs of Police to encourage research in and concern for the relationship between education and criminal behavior.
7. Coordinate and stimulate the collection of data on the problems of minority language citizens within the criminal and civil justice systems.
8. Monitor closely the use of the Court Interpreters Act of 1978 and suggest the possibility of expanding the act in criminal cases involving minority language groups where desired by the defendant.
9. Follow carefully any experiment permitting Spanish as the primary language in the U.S. District Court in Puerto Rico to see if a similar approach for minority language groups in the states would be desirable.

Economic Access:

10. Continue to monitor closely the educational requirements imposed by corporations and unions for access to job opportunities to assure that minority language speakers are not discriminated against.
11. Coordinate with the EEOC, the Department of Justice, and the Department of Labor's Office of Federal Contract Compliance to assure that vocational educational activities under the Department of Labor are meeting the job requirements imposed on a minority language population.
12. Develop detailed information on the impact and dissemination of English-only job rules in the private sector.

Educational Access:

13. Review the definitions of the various education acts to see whether consistent definitions of authority or program performance might be desirable to deliver services effectively to minority language groups.
14. Monitor closely the legal aspects of desegregation in relation to bilingual education and minority language groups.

General Recommendations:

15. Develop a coordinating council to provide outreach and to monitor on a continuing basis the issues related to minority language students.

16. Through this coordinating council or other mechanisms publish on a continual basis data on the needs of minority language groups.
17. Review the federal and state statutes to rationalize the definition of minority language groups. At present, language identification frequently is a surrogate for national origin, which has created difficulties for courts in developing remedies.

Notes

1. L. Johnson, "Address on Voting Rights to Joint Session of Congress," March 15, 1965, reprinted in Schwartz, *Statutory History of the United States: Civil Rights,* Part 2, (1970), p. 1506.
2. U.S. House of Representatives, Committee on the Judiciary, Report No. 439 (1965).
3. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 337 (1966).
4. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 334 (1966).
5. U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (1975), pp. 114-119.
6. Ibid. p. 349.
7. Testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, in U.S. House of Representatives, Extension of the Voting Rights Act, Hearings before the Civil and Constitutional Rights Subcommittee of the Committee on the Judiciary, March 5, 1975, p. 177 et seq. (hereinafter "House Hearings.")
8. House Hearings, pp. 853, 856.
9. House Hearings, pp. 598, 599.
10. 42 U.S.C.A. 1973aa-1a.
11. Testimony of George J. Korbel, Assistant Regional Attorney for the Equal Employment Opportunity Commission, Chicago, Ill., in House Hearings, pp. 361-364.
12. *Graves* v. *Barnes,* 343 F. Supp. 704, 731 (W.D. Texas, 1972).
13. See also *Graves* v. *Barnes,* 378 F. Supp. 640, 648 (W.D. Texas, 1974).
14. *White* v. *Regester,* 412 U.S. 753, 768 (1972), citing *Graves* v. *Barnes,* 343 F. Supp. 704, 731.
15. 42 U.S.C.A. 1973 (f) (1).
16. 42 U.S.C.A. 1973 (f) (3).
17. 42 U.S.C.A. 1973 (f) (4).
18. House Hearings, p. 41.

19. 42 U.S.C.A. 1973aa-1 (e).

20. House Hearings, pp. 22, 23, 30.

21. 625 F.2d. 547 (Fifth. Cir. 1980). Cert. den. ______U.S.______, 49 *Law Week* 3860 (May 19, 1981). No showing that incorporating village discriminated against Mexican Americans under Fourteenth or Fifteenth Amendments. But see *Caserta* v. *Dickinson*, 491 F. Supp. 500 (S.D. Tex. 1980).

22. 446 U.S. 55 (1980).

23. This point was elaborated upon in Justice Rehnquist's dissent from the denial of certiorari by the Supreme Court in the *Uvalde* case. 49 *Law Week* 3860 (May 19, 1981).

24. 625 F.2d 547 (Fifth Cir. 1980) at 553.

25. Ibid. at 556.

26. 384 U.S. 672 (1966).

27. *Cardona* v. *Power*, 384 U.S. 672, 674 (1966). A new draft of the New York constitution eliminated literacy requirements, but this constitution failed ratification in 1967. The statutory literacy test in New York has been amended to correspond with Section 4(e) of the Voting Rights Act of 1965. N.Y. Election Law §168 (McKinney Supp. 1968).

28. *Cardona* v. *Power*, 384 U.S. 672, 675-77 (1966) (dissenting opinion).

29. Ibid. at 677. See Comment, 45 *Notre Dame Lawyer* 142, 147-48 (1969) (discussing the applicability of such a "far sterner test" when the right of suffrage is qualified by state law).

30. 466 P.2d244 (Calif. Sup. Crt. 1970).

31. *Puerto Rican Organization for Political Action* v. *Kusper*, 490 F. 2d 575 (7th Cir. 1973); *Torres* v. *Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Arroyo* v. *Tucker*, 372 F. Supp. 754 (E.D. Pa. 1974); *Coalition for Education in District One* v. *New York City Board of Education*, 370 F. Supp. 42 aff'd. 495 F.2d 1090 (1974).

32. Voting Rights Act of 1965 §4, 42 U.S.C. §1973b(e) (1) (Supp. III 1968). A broader exception for those literate in Spanish but not English was found in the Mansfield-Dirksen bill introduced in 1962. S. 2750, 87th Cong., 2nd Sess. (1962). See also U.S. Commission on Civil Rights, Report on Voting (1961). The commission recommended federal legislation either: (1) limiting state voting requirements to citizenship, residence, confinement at the time of registration or election age, or conviction of a felony; or (2) establishing evidence of a sixth grade education as sufficient to qualify under a literacy test. Id. at 139-41. The commission, because of the doubtful constitutionality of such a provision, left open the question

of a sixth grade education in Spanish satisfying its second recommendation. See generally, Bernhard, "The Federal Fact-Finding Experience: A Guide to Negro Enfranchisement," 27 *Law and Contemporary Problems* 468, 479 (1962); Maggs and Wallace, "Congress and Literacy Tests: A Comment on Constitutional Power and Legislative Abrogation," 27 *Law and Contemporary Problems* 510, 533 (1962).

33. 384 U.S. 641 (1966).
34. Ibid. at 654-56.
35. The lower courts had discussed congressional policy with respect to education in Puerto Rico, and the recent Puerto Rican immigration to the mainland U.S. They noted that these migrations were different from the earlier Italian and Jewish immigration because of the possibility that Puerto Rican immigrants would frequently return to Puerto Rico and because Puerto Rico is part of the U.S. The lower courts noted also that the Puerto Ricans' plight stemmed in part from the congressional policy that encouraged the use of Spanish in Puerto Rico, and in part from the fact that states often prevented the Puerto Rican immigrant from integrating into the mainstream of U.S. life because of an inability to speak English. See, e.g., *United States* v. *County Board of Elections,* 248 F. Supp. 316, 319, 323 (W.D.N.Y. 1965).
36. *Katzenbach* v. *Morgan,* 384 U.S. 641, 655 (1966).
37. Ibid. at 652.
38. *United States* v. *County Board of Elections,* 248 F. Supp. 316, 323 (W.D.N.Y. 1965).
39. New York Constitution, Article 11, Section 1 (1922).
40. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. Constitution, Art. IV, Section 3.
41. *United States* v. *County Board of Elections,* 248 F. Supp. 316, 323 (W.D.N.Y. 1965).
42. 1975 House Report, p. 28.
43. 42 U.S.C.A. 1973 (b)(e).
44. U.S. Federal Election Commission, *Bilingual Election Services: The State of the Art 1979* (1979), pp. 13-16.
45. 28 C.F.R.55.50.
46. Congressional Research Service, "The Voting Rights Act of 1965: Historical and Policy Aspects" (Issue Brief No. IB81079).
47. *United States* v. *Greenberg,* 200 F. Supp. 382 (S.D.N.Y. 1961).

48. 434 F. 2d 386 (2d Cir. 1970). But see *Commonwealth of Massachusetts* v. *Ohio*, 337 N.E. 2d 904 (1975), in which it was ruled that English-only housing notices did violate due process.

49. *Tejada-Mata* v. *INS*, 626 2d 721 (9th Cir. 1980). (It was an abuse of discretion, but harmless, for an immigration judge at a deportation hearing to refuse simultaneous translation of an INS agent's English testimony.)

50. P.L. 95-539; 92 Stat. 2040, 28 U.S.C.A. 1827.

51. 28 U.S.C.A. 1827 (a) (11).

52. Prior to the passage of the act, twelve districts did employ full-time interpreters. No new interpreters have been employed as a result of the passage of the Court Interpreters Act.

53. S. 1724 (93rd Cong., 1st Sess.).

54. H.R. 10129 (95th Cong., 1st Sess.), especially Sections 3 and 4.

55. House of Representatives, "The Use of Spanish in the Federal District Court of Puerto Rico," in hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary (96th Cong., 1st Sess., 1979).

56. Proposed Compact, Cl. 16(b). The requirement of an English-speaking jury in the federal court has also been challenged without success. See Pala, "Suit on English Requisite for Jurors Dismissed," *San Juan Star* (March 17, 1979), p. 3.

57. 48 U.S.C. §864 (1964). In 1959, the Fernos-Murray Bill suggested optional use of Spanish. H.R. 5926, 86th Cong., 1st Sess., Art XIII(b) (1959). See Leibowitz, "English Literacy: Legal Sanction for Discrimination," 45 *Notre Dame Lawyer* 7 (1969).

58. German de Granda, *Transculturación e interferencia linguística en el Puerto Rico contemporáneo 1898-1968* (1968); Delgado-Cintrón, "Las escuelas de derecho de Puerto Rico 1790-1961," 41 *Rev. Jur. U.P.R.* 7 (1973); Torres, "The Puerto Rico Penal Code of 1909-1965: A Case Study of American Legal Imperialism," 45 *Rev. Jur. U.P.R.* 1 (1976); García-Martínez, "Idioma y derecho en Puerto Rico," 20 *Revista Colonia de Abogados de Puerto Rico* 183 (1960).

59. Delgado-Cintrón, "El tribunal federal como factor de transculturación en Puerto Rico," 3 *Revista de Derechos Humanos* 112 (1973).

60. Turner, "Corrada Again Tries to Bring Spanish to Federal Courts," *San Juan Star* (March 16, 1979), p. 6.

61. House of Representatives, "The Use of Spanish in the Federal District Court of Puerto Rico," Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary (96th Cong., 1st Sess., 1979).

62. 325 F. Supp. 1341 (N.D. Cal. 1971) aff'd, 475 F. 2d 738 (9th Cir. 1973).

63. 512 P.2d 833 (Cal. 1973) cert. denied sub nom.; *Guerrero* v. *Swoap,* 414 U.S. 1137 (1974).

64. *Guerrero* v. *Carleson,* 512 P.2d 833, 837 (Cal. 1973).

65. *Carmona* v. *Sheffield,* op. cit. supra footnote 62 at 1342. The *Carmona* court assumed in its opinion that the non-English speakers before the court were aliens, and stressed that an elementary understanding of the English language is a condition to naturalization. Inasmuch as entitlement to welfare benefits cannot be conditioned on citizenship (*Graham* v. *Richardson,* 403 U.S. 365 [1971], the implication that all welfare applicants and recipients should be expected to possess English language skills is misleading. The court's reasoning also overlooks entirely the fact that there are over 50,000 Puerto Ricans in California.

66. 17 F.R.D. 674 (1976).

67. 29 C.F.R. Sec 31.3(b)(2), (a)(i) and (ii), a (1) and (IV) (1975).

68. *Sánchez* v. *Norton* Civil Action No. 15732 (D. Conn. June 3, 1974).

69. Id. The same reasoning as applied in *Sánchez* was applied in denying a motion to dismiss the complaint in *Mendoza* v. *Lavine,* 412 F. Supp. 1105 (S.D.N.Y. 1976) and *Perdoma* v. *Trainor,* 74 C. 2972 J.F. (N.D. Ill. 1975), cases virtually identical to *Sánchez.*

70. 491 F.2d 684 (7th Cir. 1974).

71. *Kuri* is distinguishable. The plaintiffs sought preliminary injunction relief and consequently were required to show that irreparable injury would flow from English-only notices. The court's finding that assistance was available to help recipients overcome the English language barrier undercut the claim of irreparable harm. The subsequent ruling in *Perdoma* v. *Trainor,* 74 C. 2972 J.F. (N.D. Ill. 1975), suggests that the *Kuri* rationale can be restricted to its narrow facts.

72. EEOC Decision No. 73-0479, Feb. 14, 1973. See also, the EEOC decision holding that grammar requirements for a position as a computer programmer amounted to unlawful discrimination because of race. EEOC Decision No. 71-1683, April 12, 1971.

73. 42 U.S.C.A. 200(e) et. seq. The act as passed in 1964 is examined in considerable detail in relation to similar state actions in M. Sovern, *Legal Restraints on Racial Discrimination in Employment* (1966).

74. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

75. Ibid. at 431.

76. Ibid.

77. 29 CFR 1606 1(a)(b).

78. J. Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (1955) at 183.

79. La. Rev. Stat. 56-501 (1950).

80. Minn. Stat. Ann. 641.06 (1945).

81. Neb. Rev. Stat. 69-204 (1966).

82. N.Y. Gen. Bus. Law 434.3 (McKinney 1968).

83. *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500 (1920).

84. Ibid. at 524-25.

85. EEOC Decision, No. 7300377, Oct. 5, 1972. 19 F.E.P. 1776.

86. EEOC Decision, No. 75-249, May 6, 1975. 19 F.E.P. 1821.

87. EEOC Decision, No. 71-446, Nov. 5, 1970. 20 F.E.P. 1127.

88. EEOC Decision, No. 72-0281, Aug. 9, 1971.

89. EEOC Decision, No. 71-446, CCH Employ. Prac. Para. 6173.

90. 522 F.2d 1215 (CA 6 1975).

91. Ibid. at 1[illegible]18-19.

92. *Graham* v. *Richardson*, 403 U.S. 365, 392 (1971).

93. *Frontera* v. *Sindell*, 525 F.2d 1215, 1219 (CA 6 1975).

94. In *Meyer* v. *Nebraska* the Supreme Court held unconstitutional a state prohibition on teaching in a language other than English and said as follows:

"It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and 'that the English language should be and become the mother tongue of all children reared in this State.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

"The power of the State to compel attendance at some school and to make reasonable regulations for all schools, *including a requirement that they shall give instructions in English, is not questioned.* Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports . . . . Our concern is with the prohibition approved by the Supreme Court. . . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition . . . . We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State." [267 U.S. 390, 401-3 (1923). Emphasis added.]

95. *Frontera* v. *Sindell*, 525 F.2d 1215, 1220 (CA 6 1975)

96. *García* v. *Gloor*, 168 F.2d 264 (Fifth Cir. 1980).

97. Ibid. at p. 268.

98. Ibid. at p. 272. Emphasis added. But see *Saucedo Brothers Well Service Inc.* 464 F. Supp. 919 (S.D. Tex 1979). (English speaking rule was not based on business necessity and was evidence of discrimination.) See also the Department of Defense order requiring the use of English in San Juan and its subsequent rescission. Dept. of Defense, MEPCE-SJU, Memorandum, "English Speaking Policy" (May 13, 1981); "Spanish Again Permitted at Army Entrance Station." *San Juan Star*, July 24, 1981, p. 1.

99. Equal Employment Opportunity Commission, Guidelines on Discrimination Because of National Origin. 45 Fed. Reg. 85632 (Dec. 29, 1980).

100. Ibid. Section 1601.b Selection Procedures at p.85636.

101. Ibid. Section 1606.7 at p.85636. This issue appears likely to continue to arise. See "English Only Rule in Texas Stirs Storm." *New York Times*, Aug. 26, 1981.

102. EEOC, Memorandum from Eleanor Holmes Norton, Chairman, to Heads of All Federal Agencies re: Federal Affirmative Action Instructions Pursuant to Section 717 of the Civil Rights Act of 1964 (MD 702 December 1979).

103. Section 310 of the Civil Service Reform Act of 1978.

104. Ibid., Appendix C, C1-C2.

105. *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

106. *Luevano* v. *Campbell*, Civil Act: No. 79-0271, _____F. Supp.____ (D.D.C. 1979).

107. General Accounting Office, *Federal Employment Examinations: Do They Achieve Equal Opportunity and Merit Principle Goals?* (FPCD 79-46, 1979).

108. House of Representatives, Professional and Administrative Career Examination, Hearings before the Subcommittee on the Civil Service of the Committee on Post Office and Civil Service No. 96-32 (96th Cong., 1st Sess., 1979).

109. Supra 106. Appendix A to the order granting preliminary approval to the consent decree.

110. "In the Dallas region, the first PACE test was administered on November 16, 1974, at various locations in the Dallas five-State region. Following the administration of the test, I and members of the Dallas-Fort Worth Spanish-Speaking Program Coordinators Coun-

cil made an analysis of the test results to determine the pass/failure rate of Hispanic applicants.

"Our analysis reflected that 82 percent of Hispanics failed and only 18 passed compared to a 66 percent failure and 34 percent passing rate for nonminority applicants. The first group of eligibles numbered 2,200; of these, Hispanics numbered only 141 eligibles or 6.4 percent of the total. Even more distressing was the discovery that only eight Hispanics scored 90 or above, which is the range from which the vast majority of selections are made. A copy of this analysis has been provided to the subcommittee for its review. A less formal review of the PACE results in the San Francisco region reflected that out of an estimated 3,891 eligibles, only 48 Hispanics appeared on the PACE register." Ibid., Testimony of Carlos I. Romero, Former Southwest Regional Director, National Image, Inc., p. 73.

111. 29 U.S.C.A. 871 (a)(1).

112. 29 U.S.C.A. 872 (a)(1).

113. 42 U.S.C.A. 6705 (f)(2).

114. 20 U.S.C.A. 3223. For recent judicial interpretations see: *Castaneda* v. *Pikard* 648 F.2d 989 (5th Cir. 1981), *U.S.* v. *Texas* 506 F.Supp. 405 (E.D. Texas 1981), *Rios* v. *Read* 480 F.Supp. 14 (E.D.N.Y. 1978), *Cintron* v. *Brentwood U. Free School District* 455 F.Supp. 57 (E.D.N.Y. 1978).

115. See Chapter Five, National Advisory Council on Bilingual Education *Third Annual Report 1977*, and U.S. Commission on Education, *The Condition of Bilingual Education in the Nation* (Second Annual Report, 1978).

116. 20 U.S.C.A. 2411.

117. 20 U.S.C.A. 2401.

118. Title IV of the Higher Education Act of 1965, as amended.

119. For some of the complexities arising as a result of the twin goals of bilingual education and desegregation, see Note, "Bilingual Education and Desegregation," 127 *U. Pa. L. Rev.* 1564 (1979); Comment, "The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection," 17 *Douglas Law Review* (1979). See also, NIE, *Desegregation and Education Concerns of the Hispanic Community* (1977).

Appendix

Texts of Court Decisions

Political Access

384 U.S. 641

Nicholas de B. KATZENBACH, Attorney General of the United States, et al., Appellants,
v.
John P. MORGAN and Christine Morgan.
NEW YORK CITY BOARD OF ELECTIONS, etc., Appellants,
v.
John P. MORGAN and Christine Morgan.
Nos. 847, 877.

Argued April 18, 1966.
Decided June 13, 1966

Sol. Gen. Thurgood Marshall and J. Lee Rankin, New York City, for appellants.

Alfred Avins, Memphis, Tenn., for appellees.

Rafael Hernández Colón, Ponce, P.R., for Commonwealth of Puerto Rico, as amicus curiae.

Jean M. Coon, Albany, N.Y., for State of New York, as amicus curiae.

Mr. Justice BRENNAN delivered the opinion of the Court.

These cases concern the constitutionality of § 4(e) of the Voting Rights Act of 1965.[1] That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of §4(e) insofar as it *pro tanto* prohibits the enforcement of the election laws of New York[2] requiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack § 4(e) insofar as it would enable many of these citizens to vote.[3] Pursuant to § 14(b) of the Voting Rights Act of 1965, appellees commenced this proceeding in the District Court for the District of Columbia seeking a declaration that § 4(e) is invalid and an injunction prohibiting appellants, the Attorney General of the United States and the New York City Board of Elections, from either enforcing or complying with § 4(e).[4] A three-judge district court was designated. 28 U.S.C. §§ 2282, 2284 (1964 ed.). Upon cross motions for summary judgment, that court, one judge dissenting, granted the declaratory and injunctive relief appellees sought. The court held that in enacting § 4(e) Congress exceeded the powers granted to it by the Constitution and therefore usurped powers reserved to the States by the Tenth Amendment. 247 F.Supp. 196. Appeals were taken directly to this Court, 28 U.S.C. §§1252, 1253 (1964 ed.) and we noted probable jurisdiction. 382 U.S. 1007, 86 S.Ct. 621, 15 L.Ed.2d 524. We reverse. We hold that, in the application challenged in these cases, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment[5] and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e).

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, § 2; Seventeenth Amendment; *Ex parte Yarbrough*, 110 U.S. 651, 663, 4 St.Ct. 152, 28 L.Ed. 274. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.[6]

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction.[7] As was said with regard to § 5 in *Ex parte Com. of Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.[8] It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *People of State of New York*, 332 U.S. 261, 282-284, 67 S.Ct. 1613, 1624-1625, 91 L.Ed. 2043.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter* v. *Northhampton County Bd.*

of Election, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. Compare also *Guinn* v. *United States,* 238 U.S. 347, 366, 35 S.Ct. 926, 931, 59 L.Ed. 1340; *Camacho* v. *Doe,* 31 Misc.2d 692, 221 N.Y.S.2d 262 (1958), aff'd 7 N.Y.2d 762, 194 N.Y.S.2d 33, 163 N.E.2d 140 (1959); *Camacho* v. *Rogers,* 199 F.Supp. 155 (D.C.S.D.N.Y.1961). *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.[9] The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Ex parte Com. of Virginia, 100 U.S., at 345-346, 25 L.Ed. 676, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had this same broad scope:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

Strauder v. *West Virginia,* 100 U.S. 303, 311, 25 L.Ed. 664; *Virginia* v. *Rives,* 100 U.S. 313, 318, 25 L.Ed. 667. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in *State of South Carolina* v. *Katzenbach,* 383 U.S. 301, 326, 86 S.Ct. 803, 817, 15 L.Ed.2d 769, that "[t]he basic test to be applied in a case involving §2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." That test was identified as the one formulated in *McCulloch* v. *Maryland.* See also *James Everard's Breweries* v. *Day,* 265 U.S. 545, 558–559, 44 S.Ct. 628, 631, 68 L.Ed. 1174 (Eighteenth Amendment). Thus the *McCulloch* v. *Maryland* standard is the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether § 4(e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch* v. *Maryland* standard, whether § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."[10]

There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4(e) "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

☞ Section 4(e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.[11] Section 4(e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4(e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.[12]

The result is no different if we confine our inquiry to the question whether § 4 (e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided,[13] and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement,[14] whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.[15] Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand

Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.[16] Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *State of South Carolina* v. *Katzenbach*, supra, to which it brought a specially informed legislative competence,[17] it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

There remains the question whether the congressional remedies adopted in § 4(e) constitute means which are not prohibited by, but are consistent "with the letter and spirit of the constitution." The only respect in which appellees contend that § 4(e) fails in this regard is that the section itself works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools (schools located within United States jurisdiction) in which the language of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English. This is not a complaint that Congress, in enacting § 4(e), has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected in § 4(e) to those educated in non-American-flag schools. We need not pause to determine whether appellees have a sufficient personal interest to have § 4(e) invalidated on this ground, see generally *United States* v. *Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524, since the argument, in our view, falls on the merits.

Section 4(e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in § 4(e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights, see n. 15, supra, is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen* v. *Ward*, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722, that a legislature need not "strike at all evils at the same time." *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086 and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563.

Guided by these principles, we are satisfied that appellees' challenge to this limitation in § 4(e) is without merit. In the context of the case before us, the congressional choice to limit the relief effected in § 4(e) may, for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools,[18] a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,[19] an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools,[20] and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.[21] We have no occasion to determine in this case whether such factors would justify a similar distinction embodied in a voting-qualification law that denied the franchise to persons educated in non-American-flag schools. We hold only that the limitation on relief effected in § 4(e) does not constitute a forbidden discrimination since these factors might well have been the basis for the decision of Congress to go "no farther than it did."

We therefore conclude that § 4(e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is reversed.

Reversed.

Mr. Justice DOUGLAS joins the Court's opinion except for the discussion, at pp. 1726–1728, of the question whether the congressional remedies adopted in § 4(e) constitute means which are not prohibited by, but are consistent with "the letter and spirit of the constitution." On that question, he reserves judgment until such time as it is presented by a member of the class against which that particular discrimination is directed.

NOTES

1. The full text of § 4(e) is as follows:

"(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

"(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English." 79 Stat. 439, 42 U.S.C. § 1973b(e) (1964 ed., Supp. I).

2. Article II, § 1, of the New York Constitution provides, in pertinent part:

"Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

Section 150 of the New York Election Law, McKinney's Consol.Laws, c. 17, provides, in pertinent part:

"* * * In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight."

Section 168 of the New York Election Law provides, in pertinent part:

"1. The board of regents of the state of New York shall make provisions for the giving of literacy tests.

* * * * * * * * * * * * * * * *

"2. * * * But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance."

Section 168 of the Election Law as it now reads was enacted while § 4(e) was under consideration in Congress. See 111 Cong.Rec. 19376-19377. The prior law required the successful completion of the eighth rather than the sixth grade in a school in which the language of instruction was English.

3. This limitation on appellees' challenge to § 4(e), and thus on the scope of our inquiry, does not distort the primary intent of § 4(e). The measure was sponsored in the Senate by Senators Javits and Kennedy and in the House by Representatives Gilbert and Ryan, all of New York, for the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. Throughout the congressional debate it was repeatedly acknowledged that § 4(e) had particular reference to the Puerto Rican population in New York. That situation was the almost exclusive subject of discussion. See 111 Cong.Rec. 11028, 11060-11074, 15666, 16235-16245, 16282-16283, 19192-19201, 19375-19378; see also Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., 100-101, 420-421, 508-517 (1965). The Solicitor General informs us in his brief to this Court, that in all probability the practical effect of § 4(e) will be limited to enfranchising those educated in Puerto Rican schools. He advises us that, aside from the schools in the Commonwealth of Puerto Rico, there are no public or parochial schools in the territorial limits of the United States in which the predominant language of instruction is other than English and which would have generally been attended by persons who are otherwise qualified to vote save for their lack of literacy in English.

4. Section 14(b) provides, in pertinent part:

"No court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue * * * any restraining order or temporary or permanent injunction against the * * enforcement of any provision of this Act or any section of any Federal officer or employee pursuant hereto." 79 Stat. 445, 42 U.S.C. §1973*l*(b) (1964 ed., Supp. I).

The Attorney General of the United States was initially named as the sole defendant. The New York City Board of Elections was joined as a defendant after it publicly announced its intention to comply with § 4(e); it has taken the position in these proceedings that § 4(e) is a proper exercise of congressional power. The Attorney General of the State of New York has participated as *amicus curiae* in the proceedings below and in this Court, urging § 4(e) be declared unconstitutional. The United States was granted leave to intervene as a defendant, 28 U.S.C. § 2403 (1964 ed.); Fed.Rule Civ.Proc. 24(a).

5. "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is therefore unnecessary for us to consider whether § 4(e) could be sustained as an exercise of power under the Territorial Clause, Art. IV, § 3; see dissenting opinion of Judge McGowan below, 247 F.Supp., at 204; or as a measure to discharge certain treaty obligations of the United States, see Treaty of Paris of 1898, 30 Stat. 1754, 1759; United Nations Charter, Articles 55 and 56, 59 Stat. 1033; Art. I, § 8, cl. 18. Nor need we consider whether § 4(e) could be sustained insofar as it relates to the election of federal officers as an exercise of congressional power under Art. I, § 4, see *Minor* v. *Happersett*, 21 Wall. 162, 171, 22 L.Ed. 627; *United States* v. *Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368; Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess., 302, 306-311 (1962) (brief of the Attorney General); nor whether § 4(e) could be sustained, insofar as it relates to the election of state officers, as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government, Art. IV, § 4; Art. I, § 8, cl. 18.

6. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169: *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675. See also *United States* v. *Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717; *Louisiana* v. *United States*, 380 U.S. 145, 151, 85 S.Ct. 817, 821, 13 L.Ed.2d 709; *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072; *Pope* v. *Williams*, 193 U.S. 621, 632-634, 24 S.Ct. 573, 575-576, 48 L.Ed. 817; *Minor* v. *Happersett*, 21 Wall. 162, 22 L.Ed. 627; cf. *Burns* v. *Richardson*, 384 U.S. 73, at 92, 86 S.Ct. 1286, at 1296, 16 L.Ed.2d 376; *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

7. For the historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary, see generally Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1356-1357; Harris, The Quest for Equality, 33-56 (1960); tenBroek, The Antislavery Origins of the Fourteenth Amendment 187-217 (1951).

8. Senator Howard, in introducing the proposed Amendment to the Senate, described § 5 as "a direct affirmative delegation of power to Congress," and added:

"It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., 2766, 2768 (1866).

This statement of § 5's purpose was not questioned by anyone in the course of the debate. Flack, The Adoption of the Fourteenth Amendment 138 (1908).

9. In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, The Antislavery Origins of the Fourteenth Amendment 187-190 (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See, e.g., Cong.Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

10. Contrary to the suggestion of the dissent, infra, 384 U.S. p. 668, 86 S.Ct. p. 1736, 16 L.Ed.2d p. 845, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

11. Cf. *James Everard's Breweries* v. *Day*, supra, which held that, under the Enforcement Clause of the Eighteenth Amendment, Congress could prohibit the prescription of intoxicating malt liquor for medicinal purposes even though the Amendment itself only prohibited the manufacture and sale of intoxicating liquors for beverage purposes. Cf. also the settled principle applied in the Shreveport Case (*Houston, E. & W.T.R. Co.* v. *United States*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341), and expressed in *United States* v. *Darby*, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end * * *." Accord, *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed. 2d 258.

12. See, e.g., 111 Cong.Rec. 11061-11062, 11065-11066, 16240; Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, supra, 507-508.

13. The principal exemption complained of is that for persons who had been eligible to vote before January 1, 1922, See n. 2, supra.

14. This evidence consists in part of statements made in the Constitutional Convention first considering the English literacy requirement, such as the following made by the sponsor of the measure: "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races * * * . The danger has begun.* * * We should check it." III New York State Constitutional Convention 3012 (Rev. Record 1916).

See also id., at 3015-3017, 3021-3055. This evidence was reinforced by an understanding of the cultural milieu at the time of proposal and enactment, spanning a period from 1915 to 1921—not one of the enlightened eras of our history. See generally Chafee, Free Speech in the United States 102, 237, 269-282 (1954 ed.). Congress was aware of this evidence. See, e.g., Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, supra, 507-513; Voting Rights, House Hearings, n. 3, supra, 508-513.

15. Other States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not literate in English. For example, in Hawaii, where literacy in either English or Hawaiian suffices, candidates' names may be printed in both languages, Hawaii Rev.Laws § 11-38 (1963 Supp.); New York itself already provides assistance for those exempt from the literacy requirement and are literate in no language, N.Y. Election Law, § 169; and, of course, the problem of assuring the intelligent exercise of the franchise has been met by those States, more than 30 in number, that have no literacy requirement at all, see e.g., Fla. Stat.Ann. §§ 97.061, 101.061 (1960) (form of personal assistance); New Mexico Stat.Ann. §§ 3-2-11, 3-3-13 (personal assistance for those literate in no language), §§ 3-3-7, 3-3-12, 3-2-41 (1953) (ballots and instructions authorized to be printed in English or Spanish). Section 4(e) does not preclude resort to these alternative methods of assuring the intelligent exercise of the franchise. True, the statute precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, see, e.g., *Carrington* v. *Rash*, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169; *Thomas* v. *Collins*, 323 U.S. 516, 529-530. 65 S.Ct. 315, 322-323, 89 L.Ed. 430; *Thornhill* v. *State of Alabama*, 310 U.S. 88, 95-96, 60 S.Ct. 736, 740-741, 84 L.Ed. 1093; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4, 58 S.Ct. 778, 783-784, 82 L.Ed. 1234; *Meyer* v. *State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; and Congress is free to apply the same principle in the exercise of its powers.

16. See, e.g., 111 Cong.Rec. 11060-11061, 15666, 16235. The record in this case includes affidavits describing the nature of New York's two major Spanish-language newspapers, one daily and one weekly, and its three full-time Spanish-language radio stations and affidavits from those who have campaigned in Spanish-speaking areas.

17. See, e.g., 111 Cong.Rec. 11061 (Senator Long of Louisiana and Senator Young), 11064 (Senator Holland), drawing on their experience with voters literate in a language other than English. See also an affidavit from Representative Willis of Louisiana expressing the view that on the basis of his thirty years' personal experience in politics he has "formed a definite opinion that French-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language."

18. See, e.g., 111 Cong.Rec. 11060-11061.

19. See Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt.L.Rev.1 (1953).

20. See, e.g., 111 Cong.Rec. 11060-11061, 11066, 11073, 16235. See Osuna, A History of Education in Puerto Rico (1949).

21. See, e.g., 111 Cong.Rec. 16235; Voting Rights, House Hearings, n. 3, supra, 362. See also Jones Act of 1917, 39 Stat. 953, conferring United States citizenship on all citizens of Puerto Rico.

384 U.S. 672

Martha CARDONA, Appellant,
v.
James M. POWER et al.

No. 673.

Argued April 18, 1966.
Decided June 13, 1966.

Paul O'Dwyer, New York City, for appellant.

Samuel A. Hirshowitz, New York City, for appellees.

Mr. Justice BRENNAN, delivered the opinion of the Court.

This case was argued with *Katzenbach* v. *Morgan,* 384 U.S. 641, 86 S.Ct. 1731, 16 L.Ed.2d 828, also decided today. We there sustained the constitutionality of § 4(e) of the Voting Rights Act of 1965, and held that, by force of the Supremacy Clause and as provided in § 4(e), the State of New York's English literacy requirement cannot be enforced against persons who had successfully completed a sixth grade education in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English. In this case, which was adjudicated by the New York courts before the enactment of § 4(e), appellant unsuccessfully sought a judicial determination that the New York English literacy requirement, as applied to deny her the right to vote in all elections, violated the Federal Constitution.

Appellant was born and educated in the Commonwealth of Puerto Rico and has lived in New York City since about 1948. On July 23, 1963, she attempted to register to vote, presenting evidence of United States citizenship, her age and residence; and she represented that although she was able to read and write Spanish, she could not satisfy New York's English literacy requirement. The New York City Board of Elections refused to register her as a voter solely on the ground that she was not literate in English. Appellant then brought this proceeding in state court against the Board of Elections and its members. She alleged that the New York English literacy requirement as applied was invalid under the Federal Constitution and sought an order directing the Board to register her as a duly qualified voter, or, in the alternative, directing the Board to administer a literacy test in the Spanish language, and, if she passed the test, to register her as a duly qualified voter. The trial court denied the relief prayed for and the New York Court of Appeals, three judges dissenting, affirmed. 16 N.Y.2d 639, 261 N.Y.S.2d 78, 209 N.E.2d 119, remittitur amended, 16 N.Y.2d 708, 827, 261 N.Y.S.2d 900, 209 N.E.2d 556, 210 N.E.2d 458. We noted probable jurisdiction. 382 U.S. 1008, 86 S.Ct. 614, 15 L.Ed.2d 524.

Although appellant's complaint alleges that she attended a school in Puerto Rico, it is not alleged therein nor have we been clearly informed in any other way whether, as required by § 4(e), she successfully completed the sixth grade of a public school in, or a private school accredited by, the Commonwealth.[*] If she had completed the sixth grade in such a school, her failure to satisfy the New York English literacy requirement would no longer be a bar to her registration in light of our decision today in *Katzenbach* v. *Morgan*. This case might therefore be moot; appellant would not need any relief if § 4(e) in terms accomplished the result she sought. Cf., e.g., *Dinsmore* v. *Southern Express Co.*, 183 US. 115, 119-120, 22 S.Ct. 45, 46, 46 L.Ed. 111. Moreover, even if appellant were not specifically covered by § 4(e), the New York courts should in the first instance determine whether, in light of this federal enactment, those applications of the New York English literacy requirement not in terms prohibited by § 4(e) have continuing validity. We therefore vacate the judgment, without costs to either party in this Court, and remand the cause to the Court of Appeals of New York for such further proceedings as it may deem appropriate.

It is so ordered.

Judgment vacated and cause remanded.

Mr. Justice DOUGLAS, with whom Mr. Justice FORTAS concurs, dissenting.

Appellant is an American of Spanish ancestry, literate in the Spanish language but illiterate in English and hence barred from voting by New York's statute.

I doubt that literacy is a wise prerequisite for exercise of the franchise. Literacy and intelligence are not synonymous. The experience of nations[1] like India, where illiterate persons have returned to office responsible governments over and again, emphasizes that the ability to read and write is not necessary for an intelligent use of the ballot. Yet our problem as judges is not to determine what is wise or unwise. The issues of constitutional power are more confined. A State has broad powers over elections; and I cannot say that it is an unconstitutional exercise of that power to condition the use of the ballot on the ability to read and write. That is the only teaching of *Lassiter* v. *Northampton Election Board*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072. But we are a multi-racial and multilinguistic nation; and there are groups in this country as versatile in Spanish, French, Japanese, and Chinese, for example, as others are in English. Many of them constitute communities in which there are widespread organs of public communication in one of those tongues—such as newspapers, magazines, radio, and television which regularly report and comment on matters of political interest and public concern. Such is the case in New York City where Spanish-language newspapers and periodicals flourish and where there are Spanish-language radio broadcasts which appellant reads and listens to. Before taking up residence in New York City she lived in Puerto Rico where she regularly voted in gubernatorial, legislative and municipal elections. And so our equal protection question is whether intelligent use of the ballot should not be as much presumed where one is versatile in the Spanish language as it is where English is the medium.

New York's law permits an English-speaking voter to qualify either by passing an English literacy test[2] or by presenting a certificate showing completion of the sixth grade of an approved elementary school in which English is the language of instruction.[3] But a Spanish-speaking person, such as appellant, is offered no literacy test in Spanish. Her only recourse is to a certificate showing completion of the sixth grade of a public school in, or a private school accredited by, the Commonwealth of Puerto Rico;[4] and prior to § 4(e) of the Voting Rights Act that school had to be one in which English was the language of instruction. The heavier burden which New York has placed on the Spanish-speaking American cannot in my view be sustained, under the Equal Protection Clause of the Fourteenth Amendment.

We deal here with the right to vote which over and again we have called a "fundamental matter in a free and democratic society." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 12 L.Ed. 2d 506; *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 667, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169. Where classifications might "invade or restrain" fundamental rights and liberties, they must be "closely scrutinized and carefully confined." *Harper* v. *Virginia State Board of Elections*, supra, at 670, 86 S.Ct. at 1083. Our philosophy that removal of unwise laws must be left to the ballot, not to the courts, requires that recourse to the ballot not be restricted as New York has attempted. It little profits the Spanish-speaking people of New York that this literacy test can be changed by legislation either in Albany or in Washington, D.C., if they are barred from participating in the process of selecting those legislatures. This is a fundamental reason why a far sterner test is required when a law—whether state or federal—abridges a fundamental right.[5]

New York, as I have said, registers those who have completed six years of school in a classroom where English is the medium of instruction and those who pass an English literacy test. In my view, there is no rational basis—considering the importance of the right at stake—for denying those with equivalent qualifications except that the language is Spanish. Thus appellant has, quite apart from any federal legislation, a constitutional right to vote in New York on a parity with an English-speaking citizen—either by passing a Spanish literacy test or through a certificate showing completion of the sixth grade in a Puerto Rican school where Spanish was the classroom language. In no other way can she be placed on a constitutional parity with English-speaking electors.

NOTES

[*] Presumably the predominant classroom language of the school she attended was other than English, and thus that element of § 4(e) is satisfied. If the predominant classroom language had been English, and if she had successfully completed the sixth grade, then she would be entitled to vote under § 168 of the New York Election Law, McKinney's Consol.Laws, c. 17. See n. 2, in *Katzenbach* v. *Morgan*, ante.

1. Puerto Rico in the last quarter century has also provided a demonstration of the point, although it is fast overcoming its illiteracy problem. In 1940 31.5% of its people were illiterate. The rate was reduced to 13.8% in 1965. Selected Indices of Social and Economic Progress: Fiscal Years 1939-40, 1947-48 to 1964-65 (Puerto Rico Bureau of Economic and Social Analysis) 7-8. During this period the people have elected highly progressive and able officials.

2. Section 168(1), McKinney's Consolidated Laws of New York Ann., Election Law.

3. Id., § 168(2).

4. Ibid.

5. See *Thornhill* v. *State of Alabama*, 310 U.S. 88, 95-96, 60 S.Ct. 736, 740, 84 L.Ed. 1093; *Thomas* v. *Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430; *Ashton* v. *Kentucky*, 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469.

412 U.S. 755, 37 L.Ed.2d 314

Mark WHITE, Jr., et al.
Appellants
v.
Diana REGESTER et al.
No. 72-147.

Argued Feb. 26, 1973.
Decided June 18, 1973.

Leon Jaworski, Houston, Tex., for appellants.

David R. Richards, Austin, Tex., for appellees Regester and others.

Ed Idar, Jr., San Antonio, Tex., for the Mexican-American appellees, Bernal and others.

Thomas Gibbs Gee, Austin, Tex., for the Republican appellees Willeford and others.

Mr. Justice WHITE delivered the opinion of the Court.

This case raises two questions concerning the validity of the reapportionment plan for the Texas House of Representatives adopted in 1970 by the State Legislative Redistricting Board: First, whether there were unconstitutionally large variations in population among the districts defined by the plan; second, whether the multimember districts provided for Bexar and Dallas Counties were properly found to have been invidiously discriminatory against cognizable racial or ethnic groups in those counties.

The Texas Constitution requires the state legislature to reapportion the House and Senate at its first regular session following the decennial census. Tex.Const., Art. III, § 28 Vernon's Ann. St.[1] In 1970, the legislature proceeded to reapportion the House of Representatives but failed to agree on a redistricting plan for the Senate. Litigation was immediately commenced in state court challenging the constitutionality of the House reapportionment. The Texas Supreme Court held that the legislature's plan for the House violated the Texas Constitution.[2] *Smith* v. *Craddick,* 471 S.W.2d 375 (1971). Meanwhile, pursuant to the requirements of the Texas Constitution, a Legislative Redistricting Board had been formed to begin the task of redistricting the Texas Senate. Although the Board initially confined its work to the reapportionment of the Senate, it was eventually ordered, in light of the judicial invalidation of the House plan, to also reapportion the House. *Mauzy* v. *Legislative Redistricting Board,* 471 S.W.2d 570 (1971).

On October 15, 1971, the Redistricting Board's plan for the reapportionment of the Senate was released, and, on October 22, 1971, the House plan was promulgated. Only the House plan remains at issue in this case. That plan divided the 150-member body among 79 single-member and 11 multimember districts. Four lawsuits, eventually consolidated, were filed challenging the Board's Senate and

House plans and asserting with respect to the House plan that it contained impermissible deviations from population equality and that its multimember districts for Bexar County and Dallas County operated to dilute the voting strength of racial and ethnic minorities.

A three-judge District Court sustained the Senate plan, but found the House plan unconstitutional. *Graves* v. *Barnes*, 343 F.Supp. 704 (WDTex. 1972). The House plan was held to contain constitutionally impermissible deviations from population equality, and the multimember districts in Bexar and Dallas Counties were deemed constitutionally invalid. The District Court gave the Texas Legislature until July 1, 1973, to reapportion the House, but the District Court permitted the Board's plan to be used for purposes of the 1972 election, except for requiring that the Dallas County and Bexar County multimember districts be reconstituted into single-member districts for the 1972 election.

Appellants appealed the statewide invalidation of the House plan and the substitution of single-member for multimember district in Dallas County and Bexar County.[3] Mr. Justice Powell denied a stay of the judgment of the District Court, 405 U.S. 1201, 92 S.Ct. 752, 30 L.Ed.2d 769 and we noted probable jurisdiction sub nom., *Bullock* v. *Regester*, 409 U.S. 840, 93 S.Ct. 70, 34 L.Ed.2d 79.

I

We deal at the outset with the challenge to our jurisdiction over this appeal under 28 U.S.C. § 1253, which permits injunctions in suits required to be heard and determined by a three-judge district court to be appealed directly to this Court.[4] It is first suggested that the case was not one required to be heard by a three-judge court. The contention is frivolous. A statewide reapportionment statute was challenged and injunctions were asked against its enforcement. The constitutional questions raised were not insubstantial on their face, and the complaint clearly called for the convening of a three-judge court. That the court declared the entire apportionment plan invalid, but entered an injunction only with respect to its implementation for the 1972 elections in Dallas and Bexar Counties, in no way indicates that the case required only a single judge. Appellants are therefore properly here on direct appeal with respect to the injunction dealing with Bexar and Dallas Counties, for the order of the court directed at those counties was literally an order "granting . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges" within the meaning of § 1253.

We also hold that appellants, because they appealed from the entry of an injunction, are entitled to review of the District Court's accompanying declaration that the proposed plan for the Texas House of Representatives, including those portions providing for multimember districts in Dallas and Bexar Counties, was invalid statewide. This declaration was the predicate for the court's order requiring Dallas and Bexar Counties to be reapportioned into single districts; for its order that "unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts within the State in accordance with the constitutional guidelines set out in this opinion this Court will so reapportion the State of Texas"; and for its order that the Secretary of State "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion . . . ." 343 F. Supp., at 737. In these circumstances, although appellants could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, *Gunn* v. *University Committee*, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); *Mitchell* v. *Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970), we conclude that we have jurisdiction of the entire appeal. *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960). With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. *Roe* v. *Wade*, supra, 410 U.S. at 123, 93 S.Ct. at 711; *Carter* v. *Jury Comm'n*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); *Florida Lime & Avocado Growers* v. *Jacobsen*, supra, 362 U.S. at 80, 80 S.Ct. at 573.

II

The reapportionment plan for the Texas House of Representatives provides for 150 representatives to be selected from 79 single-member and 11 multimember districts. The ideal district is 74,645 persons. The districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between the largest and smallest district is thus 9.9%.[5]

The District Court read our prior cases to require any deviations from equal population among districts to be justified by "acceptable reasons" grounded in state policy; relied on *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), to conclude that the permissible tolerances suggested by *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), had been substantially eroded; suggested that *Abate* v. *Mundt*, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971), in accepting total deviations of 11.9% in a county reapportionment was *sui generis;* and considered the "critical issue" before it to be whether "the State [has] justified any and all variances, however small, on the basis of a consistent, rational State policy." 343 F.Supp., at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court concluded that justification by appellants was called for and could discover no acceptable state policy to support the deviations. The District Court was also critical of the actions and procedures of the Legislative Reapportionment Board and doubted "that [the] board did the sort of deliberative job . . . worthy of judicial abstinence." Id., at 717. It also considered the combination of single-member and multimember districts in the House plan "haphazard," particularly in providing single-member districts in Houston and multimember districts in other metropolitan areas, and that this "irrationality, without reasoned justification, may be a separate and distinct ground for declaring the plan unconstitutional."[6] Ibid. Finally, the court specifically invalidated the use of multimember districts in Dallas and Bexar Counties as unconstitutionally discriminatory against a racial or ethnic group.

The District Court's ultimate conclusion was that "the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote,' and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and to Bexar Counties are unconstitutional in that they dilute the votes of racial minorities." Id., at 735.[7]

Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district between District 3 and District 85 made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error. It is plain from *Mahan* v. *Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), and *Gaffney* v.

Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298, that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. *Kirkpatrick* v. *Preisler* did not dilute the tolerances contemplated by *Reynolds* v. *Sims* with respect to state districting, and we did not hold in *Swann* v. *Adams,* 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967), or *Kilgarlin* v. *Hill,* 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), or later in *Mahan* v. *Howell,* supra, that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in *Gaffney* v. *Cummings,* supra, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%, when compared to the ideal district. Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds* v. *Sims,* 377 U.S., at 579, 84 S.Ct. at 1391; *Mahan* v. *Howell,* supra, 410 U.S. at 325, 93 S.Ct. 985, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone. The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were overrepresented or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. Because the District Court had a contrary view, its judgment must be reversed in this respect.[8]

III

We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dallas and Bexar Counties and ordered those districts to be redrawn into single-member districts. Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *Mahan* v. *Howell,* supra; see *Burns* v. *Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Fortson* v. *Dorsey,* 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965); *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964); *Reynolds* v. *Sims,* supra.[9] But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See *Whitcomb* v. *Chavis,* supra; *Burns* v. *Richardson,* supra; *Fortson* v. *Dorsey,* supra. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis,* supra, at 149–150, 91 S.Ct. at 1872.

With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F.Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." Id., at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," id., at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

IV

The same is true of the order requiring disestablishment of the multimember district in Bexar County. Consistently with *Hernandez* v. *Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the multimember district on this group constituted invidious discrimination. Surveying the historic and present condition of the Bexar County Mexican-American community, which is concentrated for the most part on the west side of the city of San Antonio, the court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas,[12] had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." 343 F.Supp., at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier[13] that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "[A] cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary." 343 F.Supp., at 731. The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that, only five Mexican-Americans since 1880 have served in the Texas Legislature from Bexar County. Of these, only two were from the Barrio area.[14] The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county. Its judgment was that Bexar County Mexican-Americans "are effectively removed from the political processes of Bexar [County] in violation of all the *Whitcomb* standards, whatever their absolute numbers may total in that County." Id., at 733. Single-member districts were thought required to remedy "the effects of past and present discrimination against Mexican-Americans," ibid., and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.

The District Court apparently paid due heed to *Whitcomb* v. *Chavis*, supra, did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, from its own special vantage point, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise.

Affirmed in part, reversed in part, and remanded.

NOTES

1. Article III, § 28, of the Texas Constitution provides:

"The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26, and 26-a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislature Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding statewide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission [Board] to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951. As amended Nov. 2, 1948."

2. The Court held that the plan violated Art. III, § 26, of the Texas Constitution, which provides:

"The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

3. In a separate appeal, we summarily affirmed that portion of the judgment of the District Court upholding the Senate plan. *Archer* v. *Smith,* 409 U.S. 808, 93 S.Ct. 62, 34 L.Ed.2d 68 (1972).

4. 28 U.S.C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

5. See Appendix to opinion of the Court, post, p. 2342.

6. It may be, although we are not sure, that the District Court would have invalidated the plan statewide because of what it thought was an irrational mixture of multimember and single-member districts. Thus, in questioning the use of single-member districts in Houston but multi-member districts in all other urban areas, and remarking that the State had provided neither "compelling" nor "rational" explanation for the differing treatment, the District Court merely concluded that this classification "may be" an independent ground for invalidating the plan. But there are no authorities in this Court for the proposition that the mere mixture of multimember and single-member districts in a single plan, even among urban areas, is invidiously discriminatory, and we construe the remarks not as part of the District Court's declaratory judgment invalidating the state plan but as mere advance advice to the Texas Legislature as to what would or would not be acceptable to the District Court.

7. The District Court also concluded, contrary to the assertions of certain plaintiffs, that the Senate districting scheme for Bexar County did not "unconstitutionally dilute the votes of any political faction or party." 343 F.Supp. 704, 735. The majority of the District Court also concluded that the Senate districting scheme for Harris County did not dilute black votes.

8. The court's conclusion that the variations in this case were not justified by a rational state policy would, in any event, require reconsideration and reversal under *Mahan* v. *Howell,* 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). The Texas Constitution, Art. III, § 26, expresses the state policy against cutting county lines wherever possible in forming representative districts. The District Court recognized the policy but, without the benefit of *Mahan* v. *Howell,* may have thought the variations too great to be justified by that policy. It perhaps thought also that the policy had not been sufficiently or consistently followed here. But it appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

9. See *Whitcomb* v. *Chavis,* 403 U.S. 124, 141-148, 91 S.Ct. 1858, 1867-1871, 29 L.Ed.2d 363 (1971), and the cases discussed

in n.22 of that opinion, including *Kilgarlin* v. *Hill*, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), where we affirmed the District Court's rejection of petitioners' contention that the combination of single-member, multimember, and floterial districts in a single reapportionment plan was "an unconstitutional 'crazy quilt.'" Id., at 121, 87 S.Ct. at 821.

10. There is no requirement that candidates reside in subdistricts of the multimember district. Thus, all candidates may be selected from outside the Negro residential area.

11. The District Court found that "it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government." 343 F.Supp., at 726.

12. Mexican-Americans constituted approximately 20% of the population of the State of Texas.

13. The District Court found that "[t]he fact that [Mexican-Americans] are reared in a sub-culture in which a dialect of Spanish is the primary language provides permanent impediments to their educational and vocational advancement and creates other traumatic problems." 343 F.Supp., at 730.

14. Two other residents of the Barrio, a Negro and an Anglo-American, have also served in the Texas Legislature.

UNITED STATES of America,
Plaintiff-Appellant,
v.
UVALDE CONSOLIDATED INDEPENDENT
SCHOOL DISTRICT et al.,
Defendants-Appellees.
No. 79–1498.

United States Court of Appeals,
Fifth Circuit.
Sept. 2, 1980.

Rehearing and Rehearing En Banc
Denied Oct. 9, 1980

Drew S. Days, III, Walter Barnett, David Marblestone, Civil Rights Div., Dept. of Justice, Washington, D.C., for plaintiff-appellant.

Jeffrey A. Davis, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A complaint by the Attorney General, in the name of the United States, brought under the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971, 1973 to 1973bb–1, alleges that an at-large system of electing representatives to a local school board in Texas "has been implemented with the intent and purpose of causing . . . irreparable injury to Mexican-American voters . . . by effectively and purposefully precluding them from meaningful access to the political process . . . ." The district court dismissed the suit for failure to state a claim upon which relief could be granted Fed.R.Civ.P. 12(b)(6). Because we find that the complaint made allegations which, if proved, would be sufficient to warrant relief, we reverse and remand for further proceedings.

I

The case reaches us on the unsupported but not yet disproved allegations of the complaint. This initial pleading, which is required only to give notice of the claim, must be construed liberally so as to do substantial justice. Fed.R.Civ.P. 8(e). A complaint is not to be dismissed under Rule 12(b)(6) unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations.[1]

The complaint alleges that:

> the seven member Board of Trustees of the Uvalde Consolidated Independent School District is elected at-large;
>
> approximately fifty percent of the population of the school district is Mexican-American, but Mexican-American voters' residences are concentrated in one part of the City of Uvalde;

only one Mexican-American has ever been elected to the Board of Trustees and currently no Mexican-Americans serve on the board;[2]

voting is normally along racial lines;

the Board has discriminated against Mexican-Americans in the past by operating intentionally segregated elementary schools and is unresponsive to the needs of the Mexican-American community;

as a result of the school district's election system, Mexican-Americans have less opportunity than "whites" to participate in the political process and to elect candidates of their choice to the Board;

the at-large system of electing the Board has been implemented with the purpose of causing, and is causing, irreparable injury to Mexican-American voters by denying them, in effect, meaningful access to the political process and by frustrating their right to a full, undiluted vote.

Relying on these allegations, the Attorney General sought a judgment declaring that the at-large election system violated section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and enjoining the use of that system.

Acknowledging that at-large systems of selecting voters may violate the fourteenth amendment, see *White* v. *Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and, that if the complaint had been filed by an aggrieved voter, the allegations might state a fourteenth amendment claim, the district court nevertheless held that section 2 of the Voting Rights Act does not itself prohibit the maintenance of an at-large method of election for school board members,[3] and, therefore, that the Attorney General had no basis for the suit. Before this court the school district contends that the district court's conclusion should be affirmed both because section 2 does not reach at-large districting schemes and because a school board is not a "State or political subdivision" covered by section 2. We address each argument in the light of Supreme Court and Fifth Circuit interpretations of the Voting Rights Act. In doing so, we do not repeat the discussion of its history and purposes set forth in many prior decisions. See e.g., *United States* v. *Board of Commissioners of Sheffield, Ala.,* 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978); *Allen* v. *State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). However, we point out that the single statute contains a number of different provisions each with a different objective, that for its comprehension critical examination of each section is essential and that the reader cannot, therefore, assume that each of the sections is designed to reach the same objective or is necessarily to be read in the same manner.[4]

II

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which was amended in 1975 to include the words italicized below, provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, *or in contravention of the guarantees set forth in section 4(f)(2)* [42 U.S.C. § 1973b(f)(2)].

The guarantees of section 1973b(f)(2) [section 4(f)(2) of the amended Act] assure against any denial or abridgment of the right to vote because the voter is a member of a language minority group.[5] The Attorney General is authorized to sue to prevent violations of section 2.[6]

The statute applies to any "standard, practice, or procedure" that "den[ies] or abridg[es]" the right of language minority groups to vote. Section 5 of the Act, 42 U.S.C. § 1973c, which prohibits certain jurisdictions from enacting any new "standard, practice or procedure with respect to voting" unless advance clearance is obtained, has been held to include changes from multiple single district to at-large election systems. See *Allen* v. *State of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). However, section

5 is more broadly remedial than section 2 and reaches all changes in voting laws and not simply voting practices that deny or abridge the right to vote. Thus, some members of the Supreme Court have reasoned that the broad interpretation given to section 5 may not justify a similarly broad reach for section 2. "[Section 2] does not deal with every voting standard, practice, or procedure, but rather is limited to voting procedures that deny someone the right to vote." *Dougherty County Board of Education* v. *White,* 439 U.S. 32, 51, n.4, 99 S.Ct. 368, 379, n.4, 58 L.Ed.2d 269 (1978) (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) These *Dougherty* dissenters became a plurality in *City of Mobile* v. *Bolden,* —U.S.—, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) when they joined in an opinion by Justice Stewart holding that the mere dilution of the voting rights of a racial group did not violate the fifteenth amendment or, consequently, section 2 of the Voting Rights Act.

The school district now asserts, on the authority of *City of Mobile* v. *Bolden,* that a section 2 claim is not stated by allegations of dilution of voting rights, even coupled with a claim of discriminatory purpose.

III

Bolden reversed a decision of this court holding that Mobile's at-large system of elections operated to discriminate against black voters in violation of the fourteenth and fifteenth amendments. See *Bolden* v. *City of Mobile,* 571 F.2d 238 (5th Cir. 1978). Our opinion had held that, if the challenged election laws were maintained for a discriminatory purpose, they violated both the fourteenth and fifteenth amendments, and that the plaintiffs had successfully proved discriminatory motive in the district court. The Supreme Court reversed our judgment.

The *Bolden* panel had not considered the statutory section 2 claims but upheld the judgment of the district court because the districting was found to violate both the fourteenth and fifteenth amendments. The Supreme Court, however, reviewed the circuit court decision under the statute as it stood prior to the 1975 amendment. While the members of the Court were not able to agree on a majority opinion, a plurality concluded that "the sparse legislative history of [pre-amendment] § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." It, therefore, discussed the scope of the fifteenth amendment alone as coextensive with, as well as limitative of, section 2.

The plurality seems to conclude at one point "that the Fifteenth Amendment applies only to practices that directly affect access to the ballot" and is therefore not relevant to cases involving at-large districting. See *Bolden,*—U.S. at—, 100 S.Ct. at 1509 n.3, 64 L.Ed.2d at 47 (Stevens, J., concurring in the judgment) Cf. *Dougherty County Board of Education* v. *White,* 439 U.S. 32, 99 S.Ct. 368, 379 n.4, 58 L.Ed.2d 269 (1978) (Powell, J., joined by Burger, C. J., and Rehnquist, J.) (section 2 "is limited to voting procedures that deny someone the right to vote"). However, Justice Stewart's opinion for the plurality also includes an extensive discussion of the need for proof of "racially discriminatory motivation" in a fifteenth amendment challenge to voting laws and implies that, where minorities register and vote without hindrance, such purposeful discrimination had not been shown. See *Bolden,*— U.S. at—, 100 S.Ct. at 1517, 64 L.Ed.2d at 47 (White, J., dissenting) ("A plurality of the Court today agrees with the courts below that maintenance of Mobile's at-large system for election of city commissioners violates the Fourteenth and Fifteenth Amendments only if it is motivated by a racially discriminatory purpose.") Thus, the plurality's rejection of the fifteenth amendment and section 2 claims in *Bolden* may rest entirely upon the conclusion that no discriminatory motivation was shown.

The ambiguity of the plurality opinion is alleviated by the various dissents and concurring opinions, each of which indicates that in a proper case an at-large districting plan may be held to violate the fifteenth amendment and, therefore, section 2.[7] Moreover, the essential holding of this court in *Bolden*, that the fifteenth amendment prohibits purposefully discriminatory voting schemes, was approved in effect by a majority of the court. The plurality opinion focused on this requirement and appears to us to rest its conclusion that the fifteenth amendment was not violated on its finding that the "racially neutral" at-large districting was not "motivated by a discriminatory purpose."—U.S. at—, 100 S.Ct. at 1497, 64 L.Ed.2d at 47.[8]

We are convinced that the fundamental reasoning of our decision in *Bolden*, and its companion, *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978), survives the Supreme Court's decision intact. Thus, "a showing of racially motivated official action that infringes the right to vote is sufficient to state a cause of action." 571 F.2d at 221. Our precedent recognizes that at-large districting may result in substantial dilution of a minority vote and therefore constitute unconstitutional infringement of the right to vote if discriminatory purpose is shown. See *Nevett* v. *Sides;* see also *United States* v. *East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979).

The Court in *Bolden* discussed the text of section 2 as it stood prior to the 1975 minority language group amendment, even though *Bolden* was filed after that amendment. It is evident, however, for reasons we shall now discuss, that the amendment did not weaken the conclusion we have reached.

If the fifteenth amendment includes persons of Spanish heritage and others who are members of language minority groups within the protection accorded to those identified by race or color, an interpretation that has been advocated by the Department of Justice both in this case and in the Congress,[9] then the 1975 amendment subtracted nothing from practices reached by section 2, but merely extended its protection to specifically designated racial groups. In that event, the views expressed in *Bolden* apply directly to such groups. If, on the other hand, groups identifiable only by linguistic characteristics are not race or color groups, however elusive the concept of race, Congress has no fifteenth amendment authority to legislate for their protection. Because Congress's fifteenth amendment enforcement authority reaches only legislation directed against racial or color discrimination, the amendment might be considered beyond the Congress's fifteenth amendment authority.

The fourteenth amendment is broader than the fifteenth. Its protective buckler shields all citizens of the United States from abridgment of privileges and immunities of citizens, and all persons from deprivation of life, liberty and property without due process and from denial of the equal protection of the law. Congress's power under section 5 of the fourteenth amendment clearly extends to protection of any group of persons invidiously discriminated against by state law including groups identifiable by ethnic, national origin or linguistic characteristics. Purposefully discriminatory maintenance of a vote-diluting at-large districting scheme comes within the purview of that protection. See *City of Mobile* v. *Bolden; White* v. *Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

Whether Congress had power under the fifteenth amendment to extend protection to language minority groups we need not now decide. In taking this action, Congress invoked its fourteenth amendment charter as well. See 42 U.S.C. § 1973b(f); see generally H.R.Rep. No. 94-196, 94th

Cong., 1st Sess. (1975); S.Rep. No. 94-295, 94th Cong. 1st Sess. (1975), U.S. Code Cong. & Admin.News 1975, p. 774. Thus, unlike the pre-1975 Act, the present statute is not limited to fifteenth amendment compass. We interpret its language within the wider fourteenth-amendment bounds and find that it reaches any "standard, practice or procedure" instituted or maintained with the purpose of abridging the voting rights of the members of groups protected by section 2.

Although Congress's invocation of the fourteenth amendment alone might not support a conclusion that at-large districting is a "standard, practice or procedure" forbidden by section 2, the legislative discussion preceding the amendments indicates that this was Congress's view of the substantive scope of the section 2 prohibition when it adopted the amendments, whether or not that interpretation was previously proposed. In 1975, a central concern of the Congress was the need to protect language minority groups from practices that deprived them of equal political participation. Among the catalogued abuses, Congress noted the problem of "dilution of the vote" of language minority groups by voting structures, including "the at-large structure." "These structures effectively deny Mexican-American and black voters in Texas political access . . . ." H.R.Rep. No. 94-196, 94th Cong. 1st Sess. 19-20 (1975). The Congress specially invoked fourteenth amendment authority for the extension designed to alleviate the problems faced by Mexican-American voters in exercising their votes, and the House and Senate reports specifically discuss *White* v. *Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), a case in which the Supreme Court determined that a Texas at-large districting plan violated the fourteenth amendment rights of Mexican-American voters. See H.R.Rep. No. 94-196, 94th Cong. 1st Sess. 19 (1975); S.Rep. No. 94-295, 94th Cong., 1st Sess. 25 (1975). The legislative history plainly supports the United States' position that section 2, as amended, was intended to provide the Attorney General with a means of combatting the use of at-large districting plans to dilute the Mexican-American vote.

This interpretation is also supported by the structure of the amendments. The substantive protection of language minority groups was added in a separate section, § 1973b(f). That section recites Congress's concerns about the voting rights of language minority groups, the problems they have faced, the protections and prohibitions they are to receive, and the foundation of the amendments in both the fourteenth and fifteenth amendments.[10] This suggests that Congress believed its enactment was responsive to all the concerns it expressed in the legislative history.[11]

It is evident that, whatever the scope of section 2 as a fifteenth amendment enforcement statute, its amendment in 1975 to expand its reach to fourteenth amendment violations was intended to bring within its scope allegations of purposeful discrimination in at-large election schemes.[12]

IV

The Act applies only to a "State or political subdivision." The school district argues that, while it might be considered an agency of the state or a political subdivision were these terms used in their usual broad significance, they are used in the act as terms of art deliberately defined in a limited way so as to exclude such units as school districts.[13]

Section 14(c)(2) of the Act, 42 U.S.C. § 1973*l*(c)(2) states:

> The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

The Uvalde School District is patently not a county and it does not register voters. It is certainly not a political subdivision as defined by section 14(c)(2).

However, the Supreme Court has held that this definition limits the meaning of the phrase "State or political subdivision" only when it appears in certain parts of the Act, and that it does not confine the phrase as used elsewhere in the Act.[14] In *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978), the court held that section 5 of the Act, 42 §1973c, which requires a "State or political subdivision" to preclear voting changes, applied to Sheffield, Alabama, a municipality that had never registered voters and a governmental unit that, therefore, was not a state, county or registration unit.

In *Sheffield* the Court concluded that, for section 5 purposes, when a state is designated for coverage, the simple word "state" refers to all political units within the designated state. It went on to say, in deliberate dicta, that a similar argument could be made to the term "political subdivision." A school board could not be separately designated for coverage under the Act, it said, but, "once an area of a nondesignated State had been determined to be covered" all state actors within "the designated political subdivisions" were embraced by section 5.

The definition of political subdivision in section 14(c), the Court reasoned, merely limits the political units that can be designated as subject to the Act's special remedial provisions when they are in a nondesignated State, and thus limits only the phrase "political subdivision" as used in section 4(b), not the term as used elsewhere in the Act. In *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978), the Court applied section 5 to a county board of education reasoning again that the board was included within the term "State."

The meaning of the term "State or political subdivision," as used in section 4(a) was considered by the Court in *City of Rome* v. *United States*,—U.S.—, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Section 4(a) of the Act allows a covered jurisdiction to avoid its provisions by bringing a suit to establish that it has not discriminated in the past. 42 U.S.C. § 1973b. The provision is applicable with respect to a "State or political subdivision" to which the Attorney General has applied the Act's remedial provisions. In concluding that Rome, Georgia, did not come within the term "State or political subdivision" for purposes of this "bailout" provision, the Court reasoned that the legislative history clearly allowed the bailout option only to the State as a whole or to any political subdivisions separately designated by the attorney general as coming within the Act. Rome was under the Act because it was in a designated State. Thus, it could bail out only if the State did. The Court distinguished *Sheffield*, holding that it determined only that the reach of the term "State" in section 5 was geographic, not that a city was actually a "State," and that *Sheffield* simply held that the preclearance requirement for a covered state "reached all such changes made by political units in that State." Because the legislative history clearly prohibits bailouts by individual political units in a covered state, it precluded the City of Rome from separate bailout consideration.

Here we must determine whether the term "State or political subdivision" in section 2 is to be read, as it is in section 5, to include a school board (to which *Sheffield* and *Dougherty County* would lead us) or whether it excludes such a governmental unit (to which *Rome*, interpreting section 4(a), leads).

Section 5 is a special remedial provision designed to apply only to those areas where voting discrimination has historically been present. Section 2 applies throughout the nation. The reliance placed in *Sheffield* on the geographical significance of the term "State," and the interrelationship noted between section 4 and section 5, therefore, do not apply.

However, the purpose of the definitional limitation in section 14 is not served by reading that restriction into section 2. As we have seen, the limitation was intended to limit the political units that can be designated by the Attorney General as subject to the remedial provisions of section 4 when these subdivisions are in a non-designated state. Moreover the 1975 amendment (unlike the original Act) partially relies on the authority of the fourteenth amendment, which reaches all action under state authority. Justice Powell, dissenting in *Rome*, commented accurately that the Court has construed identical words to have varying meanings in different situations and has labeled the construction "protean," *Rome*, —U.S. at —, 100 S.Ct. at 1573, 64 L.Ed.2d 119. While the characterization may be correct, it is evident that the court has interpreted these identical terms to vary in meaning depending on the purpose of the statutory section employing them. It has been guided by function, not by an effort to achieve linguistic constancy.

Given the varying interpretations of the same words reached in *Sheffield* and *Dougherty County* on the one hand and in *Rome* on the other, the section 2 interpretative problem cannot be resolved merely by processes of definition or literal exegesis. Lexicons would not eliminate the ambiguity. Absent the limiting definition in section 14, the broad sweep of section 2 would certainly embrace school boards. The narrowing of the term "political subdivision" was adopted for a particular purpose not served by incorporating the same structure into section 2. As Mr. Justice Brennan pointed out in *Sheffield*, [discussing section 4(a)] thus to qualify section 2, would make it inapplicable to the actions of officials at polling places in hundreds of elections throughout the nation. 435 U.S. at 120-21, 98 S.Ct. at 973-74, 55 L.Ed.2d at 159.[15]

In our opinion Congress intended to forbid racial, color and language minority discrimination in all of the myriad elections reached by section 2. The legislative history of the 1975 amendments to the Act not only emphasizes the discriminatory use of at-large districting to dilute the votes of Mexican-Americans, but focuses in particular on the use of such districting plans by Texas school boards.[16] When Congress has so plainly identified a problem, and amended a statute to address it, we would overstep the bounds of the judicial prerogative to interpret arguably ambiguous language in such a manner as to hold that Congress did not intend to embrace the very predicament from which it sought to extricate the victims. Therefore, we conclude that a school board is a political subdivision for section 2 purposes.

For these reasons, we REVERSE and REMAND for proceedings consistent with this opinion.

JAMES C. HILL, Circuit Judge, concurring specially:

In Part III of his opinion, my brother RUBIN has ably attempted to resolve the conceded "ambiguity" of *Bolden*, viz., whether the Fifteenth Amendment applies to voting abuses of the sort here alleged. The entire discussion is dictum, however, because the panel—properly—rests its holding on the Fourteenth Amendment. Since the Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973 (West Supp. 1980), as reenacted in 1975, derives from the Fourteenth Amendment, and since all Justices in *Bolden* agreed that that Amendment reaches multimember districts adopted "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities," 100 S.Ct. at 1499 (plurality opinion), I concur in the result of Part III.

I join the remainder of the panel opinion.

NOTES

1. *Colney* v. *Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). As Professor Charles Wright says, the rule "has been stated literally hundreds of times." It "precludes final dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations that show on the face of the complaint some insuperable bar to relief." C. Wright, Law of Federal Courts, 3d ed., 322. See also 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 1215, 1216.

2. At oral argument the Assistant United States Attorney stipulated that two Mexican-Americans have recently been elected.

3. The original complaint filed by the Attorney General did not include an allegation of intentional voting discrimination. The district court dismissed that complaint, but allowed the United States twenty days within which to amend it. The United States did so, adding the allegation of intentional discrimination. The amended complaint was also dismissed by the district court which held, despite the intent allegation, that "the Attorney General, in the name of the United States, has no cause of action under . . . 42 U.S.C. § 1973 [section 2] when he alleges that as a result of the at-large method of election Mexican-American residents have less opportunity than do others to participate in the political process." The district court specifically noted that its decision did not affect the right of private citizens to bring an action. The district court also rejected the United States' other bases for the claim; however, on appeal the United States rests solely on the contention that the complaint states a cause of action under section 2.

4. We set out very briefly, for the reader who is unfamiliar with the basic anatomy of the statute, a summary of the act.

The Voting Rights Act of 1965 enacted several different provisions to enforce the right to vote without discrimination based on race or color. Section 2, 42 U.S.C. §1973, forbids any state or political subdivision to deny or abridge the right of a citizen to vote on the basis of race or color. Section 3, 42 U.S.C. § 1973a, sets forth judicial remedies to be utilized by a court whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendments. Section 4, 42 U.S.C. §1973b, forbids the adoption of any test or device to deny or abridge the right to vote on the basis of race or color in "any" federal, state "or local election." Section 4, however, applies only to certain geographical areas: those states that maintained a voting test or device on November 1, 1964, and in which less than 50% of the persons of voting age residing in the state were registered to vote or actually voted in the presidential election of November, 1964; and, in addition, to "any political subdivision with respect to which such determinations have been made as a separate unit."

Section 5, 42 U.S.C. § 1973c, provides that, whenever a state or political subdivision designated pursuant to section 4 seeks to change a voting practice, it must obtain clearance for that change from either the United States District Court for the District of Columbia or the Attorney General. "This so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable." *United States* v. *Board of Commissioners of Sheffield, Ala.,* 435 U.S. 110, 141, 98 S.Ct. 965, 984, 55 L.Ed.2d 148 (1978) (Stevens, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) (footnote omitted).

There is a marked difference between the coverage of sections 2 and 5. Section 5, with its stringent preclearance requirements, is limited to geographical areas designated under section 4 of the Act as having a history of discrimination; section 2 applies nationwide.

5. "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." 42 U.S.C. § 1973b(f)(2).

6. See 42 U.S.C. § 1973j(d). There is also a general authorization for the Attorney

General to sue to redress violations of the Voting Rights Act of 1870, 42 U.S.C. §1971, which safeguards the right of all citizens to vote at any election, including specifically school district elections, without distinction of race or color. If a school board election is not covered by section 2, the Attorney General, therefore, may attempt to bring a complaint under 42 U.S.C. § 1971(c). Although the Attorney General asserted a cause of action under §1971 below, he does not press it before us.

7. Justice Blackmun, for example, apparently assumes such a violation in *Bolden*, but concurs in the judgment of the plurality because the relief accorded by the district court "was not commensurate with the exercise of sound judicial discretion." Justice Stevens opined that the fifteenth amendment applies in cases involving at-large districting but concluded that the constitutionality of such systems should be measured by an objective standard, rather than by focusing on motivation. Justice White felt that the evidence established discriminatory motivation and, therefore, a violation of the fourteenth and fifteenth amendments. Justices Marshall and Brennan felt that proof of discriminatory intent was unnecessary.

8. Thus, although Justice Stevens concluded that the plurality held that the fifteenth amendment does not reach at-large election systems regardless of their purpose, and that the plurality's discussion of the need for discriminatory purpose was dictum, we are inclined to accept Justice White's view that the plurality's holding rested on the requirement of discriminatory purpose in fifteenth amendment claims. In any event, it is clear that a majority of the court believes that a fifteenth amendment claim can be made out against vote-diluting at-large districting if discriminatory purpose is proved. See footnote 7, supra. Although only Justice White appears to have wholly adopted this court's reasoning in *Bolden*, a majority appears to agree with the legal principles set forth in our *Bolden* opinion but not with their application to the evidence presented.

9. *'Section 205*

The Fourteenth Amendment is added as a constitutional basis for these voting rights amendments. The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group protected under the Fifteenth Amendment. However, the enactment of the expansion amendments under the authority of the Fourteenth as well as the Fifteenth Amendment, would doubly insure the constitutional basis for the Act." H.R.Rep. No. 94-196, 94th Cong., 1st Sess. 41 (1975).

10. "The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices." 42 U.S.C. § 1973b(f)(1).

11. The Attorney General might have premised his suit specifically on § 1973b(f)(2). However, because § 1973 also extends protection as to the guarantees made by §1973b(f)(2), we find no defect in the reference to that section alone.

12. We do not reach the question whether section 2, post-amendment, forbids mere vote dilution.

13. In *Wise* v. *Lipscomb*, 437 U.S. 535, 550, 98 S.Ct. 2493, 2502, 57 L.Ed.2d 411, 423 (1978). Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Powell stated: "we have never had occasion to consider whether an analogue of this highly amorphous theory [of vote dilution] may be applied to municipal governments . . . . [T]he possibility of such distinctions has not been foreclosed . . . ." The decision in *Bolden* virtually forecloses the possibility that vote dilution is wrongful only when practiced by a governmental unit larger than a municipality. However, in enacting the Voting Rights Act, Congress may have deliberate-

ly refrained from action with regard to all political units because of its desire to preserve some state prerogatives in the federalist system. It is that possibility we now consider.

14. See n. 4, supra, for a discussion of the various contexts in which the phrase appears.

15. Mr. Justice Stevens' dissent, which was joined by Chief Justice Burger and Mr. Justice Rehnquist, in *Sheffield*, supra, suggests another meaning to the term "State," which he rejected for construction of section 5, but which does accord with the purposes of section 2. He suggested that action by the city might be considered as action of the State within the meaning of section 5. "It might be reasonable," he said 'to treat the action of entities such as Sheffield, which are within the jurisdiction of a covered state, as 'state action,' just as such governmental action would be regarded as state action in a constitutional sense." 435 U.S. at 144, 98 S.Ct. at 985, 55 L.Ed.2d at 174. He rejected that reasoning, however, because he was convinced that the limited definition of political subdivision was intended to restrict the scope of federal power to require preclearance under section 5. This reading would make the words "or political subdivision" in section 2 redundant. We would be obliged to conclude either that it was included merely to emphasize the scope of the word "state" or that it was excess. This reading, however, is not implausible. See, e.g., *United States* v. *Saint Landry Parish School Board*, 601 F.2d 859, 866 (5th Cir. 1979).

16. The at-large structure, with accompanying variations of the majority run-off, numbered place system, is used extensively among the 40 largest cities in Texas. *And, under state statute, the countless school districts in Texas elect at-large* with an option to adopt the majority run-off, numbered place system. These structures effectively deny Mexican-American and black voters in Texas political access in terms of recruitment, nomination, election and ultimately, representation. S.Rep. No. 94-295, 94th Cong., 1st Sess. 27-28 (1975) (emphasis supplied), U.S. Code Cong. & Admin.News 1975, p. 794.

Rosa TORRES et al., Plaintiffs,
v.
Alice SACHS et al., Defendants.
Raymond S. VELEZ et al., Plaintiffs,
v.
Patrick CUNNINGHAM et al.,
Defendants.
Nos. 73 Civ. 3921, 73 Civ. 2666.
United States District Court,
S.D. New York.
July 25, 1974.

Herbert Teitelbaum, Puerto Rican Legal Defense Fund, New York City, for Rosa Torres and others.

Paul Bliefer, New York City, for Raymond S. Velez and others.

New York City Corp. Counsel by Irwin Herzog, New York City, for Alice Sachs and others.

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OPINION AND ORDER

STEWART, District Judge:

Torres v. Sachs, 73 Civ. 3921 is a class action which commenced on September 12, 1973 to redress alleged violations of the plaintiffs' right to vote in the November 6, 1973 general election and in all future federal, state and local elections in New York City. Plaintiffs base their claim on the First and Fourteenth Amendments to the United States Constitution, the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., the Voting Rights Amendment of 1970, 42 U.S.C. §1973aa et seq., and 42 U.S.C. §1983.[1]

A preliminary injunction was issued by this Court on September 26, 1973 concerning the November, 1973 election, and on November 8, 1973 plaintiffs moved for summary judgment. There are no genuine issues of material fact in dispute, and, accordingly this action is ripe for summary judgment.[2] The defendants, the Board of Elections of the City of New York and its members, through the Corporation Counsel, have opposed plaintiffs' motion on the ground that the relief sought had already been made the policy of the Board of Elections of the City of New York at the time of the filing of the complaint in this case. On September 18, 1973, it was resolved by the Board of Elections that all elections in the City of New York would be on bilingual ballots and that County Chairmen of the major political parties would be requested to furnish Spanish-speaking inspectors in election districts having at least 5% Spanish-speaking voters. For reasons stated herein the above resolution does not suffice to assure the class in this action full and effective electoral rights.

This Court has jurisdiction of this action under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. §§ 1973 et seq. and 1973aa et seq.

The starting point in this controversy is the fact that persons born in Puerto Rico after April 10, 1899 are citizens of the United States. 8 U.S.C. §§ 1101(a)(38), 1401(a), 1402. Being citizens from birth, they are not required to learn English as are immigrant applicants for United States citizenship from non-English speaking foreign countries. 8 U.S.C. § 1423. Puerto Rico is a bilingual country but the primary language of its people and in its classrooms is Spanish. Many citizens, therefore, who are born and educated in Puerto Rico are unable to speak, understand or read English.

Prior to the November 6, 1973 election, the defendant Board of Elections conducted elections in English only, in that they prepared and distributed ballots, voting instructions and other election materials in English only and failed to provide bilingual personnel at appropriate polling places to assist the Spanish-speaking voters.

Section 4(e) of the Voting Rights Act of 1965 (42 U.S.C. § 1973b(e) forbade "conditioning the right to vote" of a person educated for a period of six years in an American-flag school where English was not the language of instruction on his or her degree of fluency in the English language. It is clear from the legislative history and from the language of the Act itself that the class protected by this provision was the Puerto Rican community residing in the United States.[3]

In 1970, Congress amended the Voting Rights Act to prohibit all states from using any literacy tests for a period of five years. 42 U.S.C. §1973aa(a).[4] The sixth grade education requirement of Section 4(e) was eliminated, thereby prohibiting the denial of the right to vote in any election of any person educated in Puerto Rico, whatever the extent of his or her education, where that denial was because of an inability to read, write or understand the English language.

These prohibitions protect the voting rights of the plaintiff class before this Court. New York City's past English-only election system constitutes a condition on the plaintiffs' right to vote based on their ability to "read, write, understand, or interpret any matter in the English language" as presently proscribed by Section 4(e) and the 1970 Voting Rights Amendment.

In order that the phrase "the right to vote" be more than an empty platitude, a voter must be able effectively to register his or her political choice. This involves more than physically being able to pull a lever or marking a ballot.[5] It is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired. Simple logic also requires that the assistance given to the plaintiff class of voters at the polls on election day by trained representatives of the Board of Elections be in a language they understand, in order that their vote will be more than a mere physical act void of any meaningful choice. Plaintiffs cannot cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself.

The fact that the defendants have resolved to take *some* steps in the direction of giving Spanish-speaking citizens an effective vote is an inadequate assurance for such a fundamental right in a free society.[6] It is also significant that the defendants took no step to provide election assistance in

Spanish prior to this Court's orders in *Lopez* v. *Dinkins*, 73 Civ. 695 (S.D.N.Y. Feb. 14, 1973) and prior to the commencement of this action on September 12, 1973.

It is clear to this Court that defendants' past practices and procedures deprive plaintiffs of their full rights protected by the Voting Rights Act of 1965, and the 1970 Amendment. We now order the defendants to take steps that will guarantee the plaintiffs their full rights to an effective vote.

Summary judgment is granted for the plaintiffs and their class.

It is therefore

Ordered that *Torres* v. *Sachs*, 73 Civ. 3921 and *Velez* v. *Cunningham*, 73 Civ. 2666 be, and hereby are consolidated, pursuant to Rule 42(a), Fed. R.Civ.P. and it is further

Ordered that the practices and procedures of the defendants discussed herein are declared to have deprived the plaintiffs and the class they represent, of their rights protected by the Fourteenth Amendment to the United States Constitution, the Voting Rights Act of 1965, the Voting Rights Amendment of 1970 and 42 U.S.C. §1983; and it is further

Ordered that in future elections conducted by the defendant Board of Elections in New York City (1) that the defendant Board of Elections provide all written materials promulgated to voters or prospective voters in connection with the election process in both Spanish and English; (2) that the defendant Board of Elections provide ballots in both Spanish and English; (3) that all defendants combine and cooperate to provide a sufficient number of election officials who speak, read, write and understand both Spanish and English at the headquarters for the Board of Elections in each county, and at all polling places and places of registration falling, in whole or in part, in an election district, situated within a census tract containing 5 percent or more persons of Puerto Rican birth or extraction pursuant to the most recent census report; (4) that the defendant Board of Elections provide conspicuous signs at all polling places and places of registration described in the preceding clause, indicating in Spanish that election officials are available to assist Spanish-speaking voters or registrants, and that bilingual printed materials are available; and (5) that the defendant Board of Elections publicize elections in all media proportionately in a way that reflects the language characteristics of plaintiffs; and it is further

Ordered that all parties submit within 30 days of the filing of this Order, affidavits and/or briefs as to the granting of costs, disbursements and reasonable attorneys' fees to plaintiffs.

So ordered.

NOTES

1. A stipulation as to the class was approved on January 7, 1974 which certified the plaintiffs, pursuant to Rule 23(a), (b)(1) and (b)(2), Fed.R.Civ.P., as representatives of a class consisting of all persons eligible to vote who are of Puerto Rican birth or descent residing in the City of New York, who speak, read, write and understand Spanish, but who speak, read, write and understand English with severe difficulty or not at all.

2. The relief sought by the motion for summary judgment in the companion case of *Velez* v. *Cunningham*, 73 Civ. 2666, is satisfied by the relief granted herein. While some of the named defendants in the *Velez* case are not named in this case, the questions of law and fact in the two cases are virtually identical, and thus the cases are entirely appropriate for consolidation under Rule 42(a), Fed.R.Civ.P. The defendant with ultimate authority and responsibility to carry out the steps ordered is the same in both cases—the New York City Board of Elections.

3. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 645 n. 3, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

4. This provision was upheld in *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L. Ed.2d 272 (1970).

5. *Puerto Rican Organization For Political Action* v. *Kusper*, 490 F.2d 575 (7th

Cir. 1973) held that "the right to vote" encompasses the right to an effective vote, including language assistance for Puerto Rican citizens who speak, read and understand little or no English.

See *Garza* v. *Smith,* 320 F.Supp. 131, 136 (W.D.Tex.1970), vacated and remanded for appeal to 5th Circuit, 401 U.S. 1006, 91 S.Ct. 1257, 28 L.Ed.2d 542 (1971), appeal dismissed for lack of jurisdiction, 450 F.2d 790 (5th Cir. 1971); *United States* v. *Louisiana,* 265 F.Supp. 703, 708 (E.D.La.1966), aff'd, 386 U.S. 270, 87 S.Ct. 1023, 18 L.Ed.2d 39 (1970), in which the three-judge court stated: "As Louisiana recognized for 150 years, if an illiterate is entitled to vote, he is entitled to assistance at the polls that will make his vote meaningful. We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever." Id. at 708.

6. See generally *Kramer* v. *Union Free School District, No. 15,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Carrington* v. *Rash,* 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Wesberry* v. *Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

Legal Access

Serafin CARMONA and Manuel Venegas,
Individually, and on behalf of all others
similarly situated, Plaintiffs-Appellants,
v.
Gilbert L. SHEFFIELD, Director of the
California Department of Human Resources
Development, et al., Defendants-Appellees.
No. 71-1575.

United States Court of Appeals,
Ninth Circuit.
April 2, 1973.

Edward Newman (argued), Stephen Manley, Grace M. Kubota, Joel G. Schwartz, Robert A. Baines, San Jose, Cal., for plaintiffs-appellants.

Richard L. Mayers, Atty. (argued), Evelle J. Younger, Atty. Gen., San Francisco, Cal., for defendants-appellees.

Ricardo A. Callejo, San Francisco, Cal., for amicus curiae.

Before CHAMBERS and CHOY, Circuit Judges, and JAMESON,* District Judge.

CHAMBERS, Circuit Judge.

Carmona and Venegas seek to represent a class of persons who speak, read and write only Spanish and who reside in Santa Clara County, California. They were denied unemployment benefits by the California Department of Human Resources Development. According to the complaint, "The denial of unemployment insurance benefits to plaintiffs, and the subsequent dismissal of plaintiff CARMONA's administrative appeal, were a direct result of the failure of the San Jose office of HRD to make available Spanish-speaking employees to determine the validity of their claims, and the further failure of the defendants to send all written notices in Spanish to applicants who have evidenced an ability to understand only the Spanish language." They sought declaratory and injunctive relief based on constitutional claims under 42 U.S.C. § 1983 and 28 U.S.C. § 2201. They also asserted a pendant claim of violation of a California statute, and they purported to raise a claim under 42 U.S.C. § 503(a)(1) (The Social Security Act).

The district court granted the state of California's motion to dismiss the action for failure to state a claim upon which relief can be granted. Carmona and Venegas have appealed.

The district court dismissed the action because of the burden plaintiffs' desired result would impose on administration of the California system of unemployment insurance compensation.

The due process claim is that even though notices of rights under the unemployment laws are adequate for those who speak English, the notices are no notice at all to plaintiffs. We cannot say, as a constitutional matter, that there is a relatively easy means of providing a more adequate form of notice, and we conclude that California's approach is a reasonable one. *Walker* v. *City of Hutchinson,* 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956).

Giving notice in English to these appellants is not a denial of equal protection. Even if we assume that this case involves some classification by the state, the choice of California to deal only in English has a reasonable basis. Cf. *Dandridge* v. *Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

The federal statutory claim is two-fold. First, appellants assert that the California system is not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). The Secretary of Labor has certified that the California system is so reasonably calculated. *California Department of Human Resources Development* v. *Java,* 402 U.S. 121, 125, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971). We believe that the additional burdens imposed on California's finite resources and California's interest in having to deal in only one language with all its citizens support the conclusion of reasonableness.

The other portion of the federal statutory claim rests on the incorporation by the regulations issued under §503 of the requirements of the due process and equal protection clauses. We have already decided these claims against appellants.

We do not reach the pendant state claims.

The judgment is affirmed.

NOTE

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

UNITED STATES of America ex rel.
Rogelio Nieves NEGRON,
Petitioner-Appellee,
v.
The STATE OF NEW YORK,
Respondent-Appellant.
No. 112, Docket 34885.

United States Court of Appeals,
Second Circuit.
Argued Oct. 15, 1970.
Decided Oct. 15, 1970.

Hillel Hoffman, Asst. Atty. Gen. (Louis J. Lefkowitz, Atty. Gen., State of N.Y., and Samuel A. Hirshowitz, First Asst. Atty. Gen., on the brief), for respondent-appellant.

Robert Hermann, New York City (Milton Adler, The Legal Aid Society, New York City, on the brief), for petitioner-appellee.

Before LUMBARD, Chief Judge, CLARK, Associate Justice* and KAUFMAN, Circuit Judge.

IRVING R. KAUFMAN, Circuit Judge:

We affirmed in open court the granting of Negron's petition for a writ of habeas corpus by Judge Bartels. Because the issue decided by us will have important precedential value, we now set forth the reasons for our holding that the lack of adequate translation for Negron of those portions of his 1967 Suffolk County murder trial which were conducted in English rendered the trial constitutionally infirm.

Negron, a native of Arecibo, Puerto Rico, first emigrated to this country sometime between 1963 and 1965, at which time he worked for several months as a potato packer, before returning to his homeland. In 1966 Negron returned here to the same employment, living on a small farm with three co-workers in Riverhead, New York. He had been in this country for the second time only a few months when on the afternoon of August 10, 1966, a verbal brawl between Negron and one of his house-mates, Juan DelValle, both of whom had consumed a substantial amount of alcohol, resulted in the fatal stabbing of DelValle.

Within an hour of DelValle's death Negron had been arrested and charged with murder. Subsequently Negron was convicted after a jury trial of murder in the second degree and sentenced on March 10, 1967, to from twenty years to life imprisonment. After exhausting his opportunities for direct review,[1] Negron filed a pro se application for a writ of habeas corpus in the Eastern District of New York on June 25, 1969. Judge Bartels in a thorough opinion, *Negron* v. *State of New York*, 310 F.Supp. 1304 (E.D. N.Y.1970), granted Negron his re-

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lease, subject however to the state's prerogative to appeal or retry Negron within thirty days. The state then took this appeal within the requisite time.

The government does not dispute that at the time of his trial, Negron, a 23-year-old indigent with a sixth-grade Puerto Rican education, neither spoke nor understood any English. His court-appointed lawyer, Lloyd H. Baker, spoke no Spanish. Counsel and client thus could not communicate without the aid of a translator.[2] Nor was Negron able to participate in any manner in the conduct of his defense, except for the spotty instances when the proceedings were conducted in Spanish, or Negron's Spanish words were translated into English, or the English of his lawyer, the trial judge, and the witnesses against him were gratuitously translated for Negron into Spanish.

The times during pre-trial preparation and at trial when translation made communication possible between Negron and his accusers, the witnesses, and the officers of the court were spasmodic and irregular. Thus, with the aid of an interpreter, his attorney conferred with Negron for some twenty minutes before trial at the Suffolk County jail. Negron's own testimony at trial, and that of two Spanish-speaking witnesses called by the state, was simultaneously translated into English for the benefit of the court, prosecution and jury by Mrs. Elizabeth Maggipinto, an interpreter employed in behalf of the prosecution. At the commencement of the trial, Mrs. Maggipinto translated for Negron the trial court's instructions with respect to Negron's right to make peremptory challenges to prospective jurors. And, during two brief recesses in the course of Negron's four-day trial, Mrs. Maggipinto met with Negron and Baker for some ten to twenty minutes and merely summarized the testimony of those witnesses who had already testified on denial and cross-examination in English.[3] It also appears from the record that when Mrs. Maggipinto was not translating Spanish to English for the court, she would return to her home and remain there "on call." When she was present in the courtroom, she never translated English testimony for Negron while the trial was in progress.[4]

To Negron, most of the trial must have been a babble of voices. Twelve of the state's fourteen witnesses testified against him in English. Apart from Mrs. Maggipinto's occasional *ex post facto* brief resumes—the detail and accuracy of which is not revealed in any record—none of this testimony was comprehensible to Negron. Particularly damaging to Negron's defense was the testimony of Joseph Gallardo, an investigator from the Suffolk County District Attorney's office. Gallardo testified both at the *Huntley* hearing and at trial—each time in English, although he also was able to speak Spanish—that on the morning after the death of DelValle, and after Gallardo had given him the *Miranda* warnings, Negron admitted that he "killed [DelValle] because he called me a cabrón [cuckold]." Negron denied at the hearing and at trial that he had made any such statement. Negron's version of the killing was that DelValle had indeed insulted Negron—but DelValle, not Negron, then produced a kitchen knife. In an ensuing scuffle, DelValle was accidentally killed.

I

We have recently had occasion to comment that there is surprisingly sparse discussion in the case law of the right to a translator or interpreter at criminal trials.[5] We agree, however, with Judge Bartels that in the circumstances of this case "regardless of the probabilities of his guilt, Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment." Indeed, the government does not dispute the nearly self-evident proposition that an indigent defendant who could speak and understand no English would have a right to have his trial proceedings translated so as to permit him to participate effectively in his own defense, provided he made an appropriate request for this aid.[6]

It is axiomatic that the Sixth Amendment's guarantee of a right to be confronted with adverse witnesses, now also applicable to the states through the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), includes the right to cross-examine those witnesses as an "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Id. at 405, 85 S.Ct. at 1068. See also, *Bruton* v. *United States*, 391 U.S. 123, 128, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Barber* v. *Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Douglas* v. *Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Mattox* v. *United States*, 156 U.S. 237 242-243, 15 S.Ct. 337, 39 L.Ed. 409 (1895). But the right that was denied Negron seems to us even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial, see, e.g., *Lewis* v. *United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), unless by his conduct he waives that right. See, e.g., *Illinois* v. *Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 353 (1968). And it is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Dusky* v. *United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1962) (per curiam).[7] Otherwise, "[t]he adjudication loses its character as a reasoned interaction * * * and becomes an invective against an insensible object." Note, Incompetency to Stand Trial, 81 Harv.L.Rev. 454, 458 (1969).

However astute Mrs. Maggipinto's summaries may have been, they could not do service as a means by which Negron could understand the precise nature of the testimony against him during that period of the trial's progress when the state chose to bring it forth. Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness of the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.

II

Nor are we inclined to require that an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them. Simply to recall the classic definition of a waiver—"an intentional relinquishment or abandonment of a known right," *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)—is a sufficient answer to the government's suggestion that Negron waived any fundamental right by his passive acquiescence in the grinding of the judicial machinery and his failure to affirmatively assert the right. For all that appears, Negron, who was clearly unaccustomed to asserting "personal rights" against the authority of the judicial arm of the state, may well not have had the slightest notion that he had any "rights" or any "privilege" to assert them. At the hearing before Judge Bartels, Negron testified: "I knew that I would have liked to know what was happening but I did not know that they were supposed to tell me." Of obvious relevance here is the Supreme Court's logic in *Pate* v. *Robinson,* 383 U.S. 375, 384, 86 S.Ct. 836, 841, 15 L.Ed.2d 815 (1966) that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial."

Moreover, we need not decide on this record whether Negron's lawyer by his silence could effectively have waived Negron's right to appropriate access to the proceedings by means of adequate translation. There is no indication that Baker's failure to ask for an interpreter to assist Negron was any part of his trial strategy. Cf. *Wilson* v. *Bailey,* 375 F.2d 663 (4th Cir.1967). Nor could the motive for such an otherwise self-defeating strategy have been to deviously set up the case for reversal on appeal. As the history of Negron's own case attests, the federal right to a state provided translator is far from settled. Thus, Negron's counsel would have been on tenuous grounds for believing that the present claim would prevail. We would, in any event, be reluctant to find a knowing, intelligent waiver of so ill-defined a right.[8]

☞ Moreover, Judge Bartels found it "obvious that the court and the District Attorney were fully aware of Negron's disabilities." The Supreme Court held in *Pate* that when it appears that a defendant *may* not be competent to participate intelligently in his own defense because of a possible mental disability, the trial court must conduct a hearing on the defendant's mental capacity. Negron's language disability was obvious, not just a possibility, and it was as debilitating to his ability to participate in the trial as a mental disease or defect. But it was more readily "curable" than any mental disorder. The least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial.[9]

NOTES

*United States Supreme Court, retired, sitting by designation.

1. Petitioner's conviction was affirmed without opinion by the Appellate Division, Second Department on April 22, 1968, 29 A.D.2d 1050. Leave to appeal was denied by the New York Court of Appeals on July 12, 1968. Certiorari was denied by the United States Supreme Court on June 2, 1969. *Negron* v. *New York,* 395 U.S. 936, 89 S.Ct. 2000, 23 L.Ed.2d 452.

2. At the hearing before Judge Bartels, Baker testified that he "was not able to speak with" Negron "at all" without an interpreter.

3. Negron testified before Judge Bartels below that he could not recall these conferences, but both Baker and Mrs. Maggipinto attested to their occurrence.

4. Indeed, at one point Negron's own testimony was postponed because Mrs. Maggipinto had been sent home mistakenly.

5. *United States* v. *Desist,* 384 F.2d 889, 901 (2d Cir. 1967), aff'd 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1968).

6. See *Terry* v. *State,* 21 Ala.App. 100, 105 So. 386 (1925) (defendant was a deaf-mute); *García* v. *State,* 151 Tex.Cr.R. 593, 210 S.W.2d 574 (1948); *State* v. *Vasquez,* 101 Utah 444, 121 P.2d 903 (1942) (defendant spoke "broken English").

7. See also *Wilson* v. *United States,* 129 U.S.App.D.C. 107, 391 F.2d 460, 462 (1968), quoting with approval, *United States* v. *Wilson,* 263 F.Supp. 528, 533 (D.C.1966) (due process requires that defendant have a "present ability to follow the * * * proceedings * * * and discuss them rationally with his attorney").

8. See *United States* v. *Liguori,* 430 F.2d 842 (2d Cir., filed July 17, 1970) (defendant "cannot be faulted for failing to anticipate the action of the Supreme Court" subsequently taken in *Leary* v. *United States,*

395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969)).

9. The cases primarily relied on by the government are readily distinguishable. In *Desist*, defendant was clearly not indigent and he had retained the services of a law firm one of whose partners spoke French, as did the defendant, and English. In that case "the record clearly show[ed] that the judge believed the defense was not hindered by a communications barrier." 384 F.2d at 902 n. 31. In *Cervantes* v. *Cox*, 350 F.2d 855 (10th Cir. 1965), similarly, the court endorsed the trial judge's finding that appellant was "completely aware of all the proceedings." Id. at 855-856. In *Gonzalez* v. *People of the Virgin Islands*, 109 F.2d 215, 217 (3rd Cir. 1940), it simply did not seem to the court "that defendants were unable to speak or understand English."

In view of the importance of Gallardo's testimony and the large number of other witnesses who testified in English against Negron, the denial of so important a right to Negron cannot be regarded as "harmless."

UNITED STATES of America
v.
Jacob H. GREENBERG and Morris Mac Schwebel, Defendants (two cases).

United States District Court
S.D. New York.
Dec. 14, 1961.

Robert M. Morgenthau, U.S. Atty., New York City, for United States, Stephen E. Kaufman, Peter H. Morrison, Asst. U.S. Attys., New York City, of counsel.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for defendant, Morris Mac Schwebel, Simon H. Rifkind, Martin Kleinbard, Arthur B. Frommer, Allan Blumstein, New York City, of counsel.

FREDERICK van PELT BRYAN, District Judge.

Defendant Schwebel moves under Rule 6(b), F.R.Cr.P., 18 U.S.C.A., to dismiss two indictments against him "on the grounds that the Grand Jury finding the indictments was not selected, drawn or summoned in accordance with law."

The indictments were returned on February 6, 1961 by a grand jury impaneled in December 1960. Indictment 61 Cr. 132 is in one count and charges Schwebel and a co-defendant Greenberg, who is not before the court, under 18 U.S.C. § 371 with conspiring to violate provisions of the Securities Act of 1933, 15 U.S.C.A. § 77a et seq., by the use of the mails and instrumentalities of interstate commerce in dealings in corporate securities of Basic Atomics, Inc. Indictment 61 Cr. 133 is in 62 counts. The first count charges Schwebel and Greenberg under 18 U.S.C. § 371 with conspiring to violate the same provisions of law in dealings in corporate securities of Soil Builders International Corporation. The other 61 counts charge specific violations of various provisions of the Securities Act in these dealings. A motion by Schwebel to dismiss five of these counts as time barred has been granted on consent of the the Government.

The motions of defendant Schwebel directed to the selection of the grand jury returning these indictments focus on the methods used to obtain the names on the lists of qualified jurors on file in this court from which the grand jury was selected. He contends that these methods violate both statutory and constitutional requirements for selection and qualification of jurymen (28 U.S.C. § 1861, as amended by the Civil Rights Act of 1957, 71 Stat. 638; Constitution, Art. III; Amendments 6 and 7) and that therefore the grand jury drawn from such a list necessarily was illegally and improperly constituted.

After hearing argument on Schwebel's motions I directed the clerk of this court to have a statement prepared by the deputy clerk in charge of jurors and the jury commissioner, fully describing "the manner, method and procedures used for the selection, choosing and drawing of the names on the lists of persons on file in this court from which the members of the Grand Jury returning these indictments were selected." Such a statement was filed and copies furnished to counsel for the respective parties. Thereafter, at the request of counsel for Schwebel I directed the clerk to have a supplemental statement prepared and filed furnishing additional information on this subject. The supplemental statement has been filed. Thereafter counsel for both parties were advised that final submissions would be received not later than October 18, 1961. All submissions have been received and the motions are now before me for decision on the affidavits submitted by the respective parties and the two statements filed by the clerk. There has been no request to have testimony taken.

Procurement of qualified jurors in this district

It is necessary in this court to maintain a large pool of qualified prospective jurors from which the very substantial number of talesmen required in the busiest district in the country may be summoned for service. The list of qualified petit and grand jurors on file contains about 20,000 names. The list constantly requires replenishment to replace prospective jurors who have died, have moved away or have become unavailable for jury duty for other reasons.

Before persons can be added to the pool of qualified jurors a preliminary examination is necessary to determine whether they meet the statutory qualifications for jury service and are able to serve. Qualification notices are continuously being sent out summoning persons for such preliminary examination.

The names of the persons to whom such qualification notices are mailed are obtained almost entirely from the lists of those registered to vote in presidential years in the Counties of New York, Bronx and Westchester. These are the official lists of registered voters prepared every four years by the duly constituted Boards of Election in these counties.

In New York and Bronx Counties a list of registered voters is prepared by the Board for each assembly district. There are 16 assembly districts in New York County containing a total of 1,067 election districts, and 12 assembly districts in Bronx County with a total of 943 election districts. For each of the assembly districts the registered voters are listed by election districts. The names appear in parallel vertical columns on successive pages by street address.

To obtain the names to which jury qualification notices are to be sent a key number in the first column of one of the assembly district lists, counting down from the top or up from the bottom, is selected at random; for example, the fifth or tenth name from the top or bottom. Thereafter each fifth name in all the columns for the assembly district will be taken from column after column on page after page and jury qualification notices made out addressed to them. The same process is carried on through every assembly district list in rotation so that all of the assembly districts and all of the election districts are eventually covered. When all have been gone through another key number is selected at random and the same process is again repeated as often as is required to produce the number of names then needed. Thus the selection of prospective jurors for qualification is made, as part of a continuous process, with selections made at random from every part of the two counties.

In Westchester County the lists of those registered to vote in presidential years are prepared by wards for each city and town. The same method of selecting names of prospective jurors to whom qualification notices are sent is followed with respect to the Westchester County lists for the 12 cities and towns nearest the New York City limits comprising about 80% of the population of the County.

In 1960 the total number of registered voters in New York, Bronx and Westchester Counties was 1,758,142. In the years from 1950 through 1960, 187,024 qualification notices were sent out to persons selected in the manner described from the lists of registered voters in the three counties. The number of qualification notices sent out yearly to such persons ranged from a maximum of 27,950 in 1957 to a minimum of 8,575 in 1952.

In addition, qualification notices were sent out in some years during this period to persons whose names were obtained from telephone directories and real estate listings. These totaled 6,855, or some 3% of the notices sent out. Some qualification notices were also sent to persons whose names had been recommended for jury service as such names were received.

The notices to appear for jury qualification addressed to the persons selected by this method are placed on file in the office of the jury clerk until such time as additional names are required to be added to the list of qualified jurors. They are then mailed out to the prospective jurors. The notice requests the addressee to appear for preliminary examination on a day certain.

Those appearing who do not have a statutory exemption or disqualification, or a physical infirmity or other manifest hardship which would prevent them from serving, are required to complete a questionnaire which in all material respects conforms to the questionnaire suggested in the Report of the Judicial Conference Committee on the Operation of the Jury System, approved by the Judicial Conference of the United States, entitled, *The Jury System in the Federal Courts*, pp. 99–100 (1960). All those completing questionnaires who qualify are placed on the list of qualified jurors as either petit or grand jurors.

Wheel cards and history cards are made out for each person who has qualified. These cards are kept on file in the clerk's office. The wheel cards are arranged according to dates of service and time for placing in the wheel.

The grand jury wheel from which a panel of prospective grand jurors is drawn ordinarily contains between 500 and 800 wheel cards. The names in the wheel comprise qualified jurors (a) taken from the list of those whose last service was more than two years ago, (b) who were called for service and excused three months before, (c) who have been marked for service in the particular month by a judge hearing excuses, and (d) who qualified for service in the preceding month. From this wheel a panel of 75 names is drawn to be placed in the wheel from which the grand jury is ultimately selected.

The panel from which the grand jury returning these indictments was drawn was selected from the wheel on September 30, 1960. The wheel from which the panel was drawn contained 490 cards remaining from the previous drawing. The jury clerk and the jury commissioner each alternately added 25 cards selected from the list, making a total of 540 cards in the wheel. When a panel of 75 had been drawn notices were sent to the talesmen on the panel to appear for the drawing of the grand jury on December, 6, 1960. On that day the 75 names on the panel were placed in the wheel and the 23 names were drawn from the wheel and sworn in to comprise the grand jury which returned these indictments.

The jury clerk and the jury commissioner both state unequivocally that at no time has there ever been any attempt to exclude from petit or grand jury service any qualified individual, class or group.

Defendant's challenge to the method of procuring qualified jurors

Schwebel's challenge to this grand jury is based in the first instance on the fact that the list of qualified jurors on file in this court from which it was selected was taken almost entirely from the voter registration lists. He does not attack the procedures by which the grand jury was drawn from that list.

According to the figures on which defendant relies, derived from the 1960 census, there were 2,528,152 citizens over the age of 21 in the Counties of New York, Bronx and Westchester in 1960.[1] There were 1,758,142 persons registered to vote in the three counties in that same year. Defendant therefore calculates that only some 70% of the adult citizen population prospectively eligible for jury duty was canvassed to obtain qualified jurors, and that approximately 30% of such population was not canvassed at all.

This method of obtaining qualified jurors, he contends, results in the systematic exclusion from consideration of the 30% of the adult citizen population which does not register to vote. Relying chiefly on the recent decision in *United States* v. *Hoffa*, 196 F.Supp. 25 (S.D.Fla., 1961), it is his position that "while it may be proper to use voting lists as one of the sources for the selection of grand jurors, it is improper to restrict and confine such selection to such lists, in systematic exclusion of non-registered adult citizens." He contends that non-registered adult citizens are a cognizable group or class which he calls the "politically dormant," and that the result of the exclusion of such a class or group is "to insure that the juries of this district will not constitute a representative cross-section of the community" in violation of both constitutional and statutory standards for federal jury selection.

Defendant makes the further contention that this method results in the selection for jury service of a disproportionate number of persons of "higher" income. In support of this contention he quotes statements by sociologists and students of the electoral process to the general effect that persons of low income fail to exercise the franchise to a greater extent than those of higher income. This factor, he says, also contributes to the claimed non-representative character of Southern District juries.

This is further compounded, he says, by the use of telephone directories and real estate listings to obtain some 3% of the names to whom jury qualification notices were sent out, since it is likely that these sources will produce more persons of higher than lower income.

Quite apart from this, he urges that the virtually exclusive use of voter registration lists as a source of prospective jurors violates the Civil Rights Act of 1957 as it amended 28 U.S.C. § 1861, 71 Stat. 638.

I

The main thrust of defendant's challenge is based on the proposition stated in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946), that

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas*, 311 U.S. 128, 130 [61 S.Ct. 164, 165, 85 L.Ed. 84] *Glasser* v. *United States*, 315 U.S. 60, 85 [62 S.Ct. 457, 471, 86 L.Ed. 680]. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To dis-

regard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

The power of the federal courts to insure that these standards are applied derives from their supervisory powers over the administration of federal justice. *Thiel* v. *Southern Pacific Co.*, supra; *Ballard* v. *United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946). See, also, *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941), and *Fay* v. *People of State of New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947).

This power extends beyond the limits of constitutional requirements guaranteeing trial by jury and traditional concepts of due process. It includes, and, indeed, goes beyond specific statutory requirements. The systematic exclusion of a racial group or economic or social class from jury service

> "deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. As well stated in *United States* v. *Roemig*, [D.C.] 52 F. Supp. 857, 862, 'Such action is operative to destroy the basic democracy and classlessness of jury personnel.' It 'does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him.' Cf. *Kotteakos* v. *United States*, 328 U.S. 750, (764-765) [66 S.Ct. 1239, 90 L.Ed. 1557]. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, supra, 329 U.S. p. 195, 67 S.Ct. p. 265.

Thus we need not consider separately the constitutional grounds of challenge asserted generally by the defendant since the standards which the court must apply in exercising its supervisory powers necessarily include and go beyond constitutional requirements. *Thiel* v. *Southern Pacific Co.*, supra; *Ballard* v. *United States*, supra; *Fay* v. *New York*, supra; *McNabb* v. *United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1942).

The defendant here does not claim that any actual or specific prejudice to him has resulted or will result from the methods of selection which he attacks. But his right to relief is not dependent upon a showing of prejudice in his individual case. If, as he claims, the list from which this grand jury was drawn was made up in violation of prescribed and accepted standards then that in itself would entitle him to relief.[2]

However, a party making the challenge has the burden of showing that the required and accepted standards for jury selection have been violated. He must introduce or offer "distinct evidence" in support of his challenge. His failure to do so is fatal. *Glasser* v. *United States*, supra; *Frazier* v. *United States*, 335 U.S. 497, 69 S.Ct. 201, 93 L. Ed. 187 (1948); *United States* v. *Carrion*, 140 F.Supp. 226 (D.P.R. 1956). The question here is whether defendant Schwebel has sustained that burden.

Since the amendment of 28 U.S.C. § 1861 by the Civil Rights Act of 1957 the qualifications and exemptions of federal jurors are no longer determined by the laws of the state in which the federal court has its seat. The qualifications for jurors in the federal courts are laid down in § 1861 which reads:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—
>
> "(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
>
> "(2) He is unable to read, write, speak, and understand the English language.
>
> "(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

Citizens cannot be excluded from jury service "on account of race or color." 28 U.S.C. § 1863. Members of the armed services, firemen and policemen and public officers are exempted from service. 28 U.S.C. § 1862.

In addition jurors must be returned from such parts of the district as the court may direct "so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service." 28 U.S.C. § 1865.

Congress has not chosen to establish any uniform system of selecting the array of qualified jurors from which grand or petit juries are to be drawn. There is no prescribed method of selection. Congress has established uniform qualifications for individual jurors but it has left to each district the adoption of suitable methods to obtain the necessary talesmen. Within the framework of the pertinent statutory provisions "the choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers." *Thiel* v. *Southern Pacific Co.*, supra, 328 U.S. p. 220, 66 S.Ct. p. 986.[3]

The task of providing the large number of qualified jurors required in this heavily burdened court in a great metropolitan area is not without its difficulties. The objective is to obtain a pool of jurors "drawn from every economic and social group of the community without regard to race, color or politics" and possessing "as high a degree of intelligence, morality, integrity, and common sense, as can be found by the persons charged with the duty of making the selection."[4]

The administrative problem remains and the choice of sources from which the names of prospective jurors are to be selected lies in the hands of the clerk and jury commissioner acting under the direction of the District Court. No perfect system to accomplish these results has yet been devised. There is no mathematical formula by which to determine what would constitute a completely representative cross-section of the community of some 4,700,000 people comprising the Southern District of New York. The principal population of this community resides in the New York metropolitan area where every conceivable race, creed, color and political and social and economic background are represented. The ascertainment of what would constitute a completely representative cross-section of such a community is perhaps as elusive as the ascertainment of what is the ideal reasonable man so familiar to the law. All that is expected of the jury officials charged with the duty of providing a pool of qualified jurors is that the methods of selection used are reasonably designed to produce a representative cross-section of the community in the light of the practical means available. *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F.2d 414 (3 Cir., 1955), cert. den. 350 U.S. 971, 76 S.Ct. 442, 100 L.Ed. 842; *United States* v. *Flynn*, 216 F.2d 354 (2 Cir., 1954), cert. den. 348 U.S. 909, 75 S.Ct. 295, 99 L.Ed. 713; *United States* v. *Dennis*, 183 F.2d 201 (2 Cir., 1950), cert. den. 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; *United States* v. *Local 36 of International Fishermen*, 70 F. Supp. 782 (S.D.Cal. 1947), aff'd 9 Cir., 177 F.2d 320, cert. den. 339 U.S. 947, 70 S.Ct. 801, 94 L.Ed. 1361.

A party does not have a vested right in any particular method of selection. "Neither statutory nor case-made law requires the use of any particular source of names so long as there is no systematic exclusion of the members of any race, creed, social or economic group." *Padgett* v. *Buxton-Smith Mercantile Co.*, 283 F.2d 597, 598 (10 Cir. 1960), cert. den. 365 U.S. 828, 81 S.Ct. 713, 5 L.Ed. 2d 705. There is no cause to complain as long as the methods employed are reasonably designed to reach a fair cross-section. *United States* v. *Flynn*, supra.

The burden on a party challenging the method of selection is to show that the methods used were not reasonably designed to produce such a result.

In the case at bar defendant Schwebel has wholly failed to sustain the burden of showing that the primary reliance in this district on the lists of registered voters as a source of prospective jurors is not reasonably designed to produce a fair cross-section of the community.

It is significant that qualifications for federal jury service bear a striking similarity to the requirements for voter registration in the State of New York. 28 U.S.C. § 1861 provides that a citizen who has attained the age of 21 and has resided within a district for one year is qualified unless he has been convicted of a felony in a state or federal court and his civil rights have not been restored, is unable to read, write, speak and understand the English language or is incapable by reason of mental or physical infirmities of rendering efficient jury service.

Section 150 of the New York Election Law requires a voter to be a citizen over 21 years of age who has been an inhabitant of the state for one year next preceding the election, for 4 months a resident of the county, and for the last 30 days a resident of the election district. He must be able, except for physical disability, to read and write English. Persons who have been convicted of a felony and have not been restored to rights of citizenship or who accept or give bribes to influence votes are excluded from voting. New York Election Law, McKinneys Consol. Laws, c. 17, § 152.

On the figures on which the moving defendant relies the total adult citizen population of the Counties of New York, Bronx and Westchester was 2,528,152 in 1960. The number of persons registered to vote in the 1960 election in these three counties was 1,758,142. Thus, approximately 70% of the adult citizen population is included in the registration lists from which prospective jurors were obtained. There is not the slightest implication that in New York any persons qualified to vote are excluded from registering. Nor is there any implication that the selections made by the jury officials of this district from this very large majority of those who might conceivably be eligible for federal jury service were not completely fair and at random. Indeed, far from attempting to exclude any economic, social, religious, racial, political or geographic group in selecting names from the voting lists, the record shows that every effort was made not to do so. The selections were completely at random and covered every election district in every assembly district of the area. Thus, the very large majority of those conceivably eligible for federal jury service have been thoroughly and objectively canvassed.

Moreover, though 30% of those not registered to vote are uncanvassed it does not follow that all 30% are eligible for federal jury service. The unregistered 30% must necessarily include an indeterminate number of persons who were not qualified for federal jury service under the statute.

For example, persons are excluded from jury service who are "unable to read, write, speak, and understand the English language." Those unable, except for physical disability to read and write English are excluded from registration as voters. Such persons are excluded *both* from federal jury service and from voter registration.

There is no proof before me as to how large this group is. But common experience in this city indicates that even among the citizen population the number of those who cannot read and write English may be not insubstantial. One example is the substantial Spanish speaking population in New York and Bronx Counties. See Matter of the Application of *Camacho* v. *Rogers*, D.C., 199 F.Supp. 155.

Moreover, the 30% not registered to vote includes those who have not resided for one year in the state. Persons in this category would not have resided for one year in the judicial district, as required for federal jury service. Thus, an indeterminate number of citizens who are ineligible for jury service because of lack of required residence are also excluded from registering to vote.

Urban population is highly mobile. Indeed, as was pointed out by Judge Learned Hand in *United States v. Dennis*, supra, 183 F.2d p. 219, "* * * the Census shows that less than one-half the urban population lives in the same quarters for seven years * * *." There is no indication that mobility has lessened.

The number of persons who cannot register to vote and who would also be unqualified or unavailable for federal jury service is multiplied when the aged and infirm, the mentally deficient, the persons confined in institutions and the convicted felons are taken into account.

In short, the number of persons not qualified for jury service who are included within the 30% of adult citizens not registered to vote is not insubstantial and considerably more than 70% of those qualified are reached by the use of the registration lists. The challenging defendant has not enlightened the court as to how high the percentages actually go.

The defendant suggests that methods "could certainly be perfected on a scientific basis" to provide a better representative cross-section of the community. He suggests "the use of city directories," and "the use of a variety of lists (including those furnished by labor unions)." No doubt a city directory would be a helpful adjunct to the jury officials in this district. But no city directory has been published since 1933. Quite apart from the dangers inherent in selection from lists provided by private groups with special interests, *Glasser* v. *United States*, supra, it was noted by Judge Hand in the Dennis case as long ago as 1947 that when a labor union was asked for a list of prospective jurors "their people wanted nothing to do with juries." (183 F.2d p. 222). The court in *Dow* v. *Carnegie-Illinois Steel Corp.*, supra, also referred to "the meager result of soliciting names from unions." (224 F.2d p. 426). Defendant's suggestions are scarcely practical.

Nor are census lists of any practical help. Even assuming that the Secretary of Commerce was not precluded from making public information relating to and identifying individuals (13 U.S.C. § 9) and that lists of persons in usable form were available from the Census Bureau, such lists would be of little aid in this process of selection. The unreliability of lists prepared once every ten years relating to highly mobile urban populations is obvious. Short of an annual census designed to elicit information relevant to juror qualifications or a required population registration, either of which would require a staff and expenditures out of all proportion to the results obtained, the registration lists as used in this district offer the most comprehensive source of available jurors. Cf. *Brown* v. *Allen*, 344 U.S. 443, 474, 73 S.Ct. 397, 97 L.Ed. 469 (1953); *United States* v. *Local 36 of International Fishermen*, supra. A scientifically perfect system of producing a representative cross-section of the community is not required and no such system has been devised. "Arguments can be made against the use of any list, as none are available for the whole population." *United States* v. *Local 36 of International Fishermen*, supra, 70 F.Supp. p. 799. All that is required is to use methods reasonably designed to produce a jury representative of a cross-section of the community. The objective selection of names at random from registration lists as they are maintained in this community fully satisfies this requirement and commends itself to an impartial jury system.

In the light of what has been said there can be no valid challenge of a process which covers such a very large percentage of those who would be eligible for jury service, nor any claim that such an objective canvass would not produce a representative cross-section of the community unless it be shown that such a process necessarily resulted in the exclusion from service of a cognizable group or class of citizens. Here the defendant claims that non-voters by the mere fact of failing to vote constitute such a group or class and that their exclusion from consideration invalidates the selective process. He characterizes this group as "the politically dormant" and says that their common failure to vote is a cohesive factor which binds all of them together in a community of interest. There is no merit to this contention. Defendant has failed to show that those who do not register can be classed in any particular economic, social, religious, racial, political or geographical group of the community. On the contrary, they include all of such groups. Nor has defendant shown there is any fixed composition or thread which binds those in this category into a cohesive group. See *Young* v. *United States*, 94 U.S.App. D.C. 54, 212 F.2d 236 (1954), cert. den. 347 U.S. 1015, 74 S.Ct. 870, 98 L.Ed. 1137; *United States* v. *Carrion*, supra. All that such persons have in common is their failure to exercise the right of franchise at a given election. They are united only in disinterest.

The grouping shifts from election to election. The single thread of failure to vote has no permanence. Those registered to vote in one presidential election may well not be registered in another, and vice versa. See New York Election Law, § 352. There is nothing to show that they are of any particular shade of opinion. There is no indication that the failure to canvass such persons defeats in any way the concept of an array from which impartial representative juries may be selected.

In addition, defendant claims that there is a higher proportion of lower income persons among non-voters than among those who exercise the franchise. He therefore argues that the failure to canvass non-voters results in an array selected from the registration lists which has an undue proportion of those of higher income.

The material which he relies on to support this contention consists of statements by sociologists and students of the electoral process to the effect that it is generally true that more persons of lower income than higher income fail to vote. This material is presented in affidavits of counsel and consists of purely hearsay statements which do not rise to the dignity of formal proof. See *Glasser* v. *United States*, supra; *Frazier* v. *United States*, supra. It rests upon the most slender foundations. There is no showing as to how these conclusions are arrived at or any discussion of the nature or reliability of the studies on which they are alleged to rest. It has not been demonstrated that the persons to whom these statements are ascribed are qualified as experts in the evidentiary sense.

But even were the conclusions accepted at their face value they do not establish that the method of selection used violated any accepted or required standards. There is no definition of what the so-called low income or high income groups consist of. The only figures given are to the effect that the percentage of persons who do not vote range from 38% with incomes less than $2,000 to 16% with incomes of over $5,000. There is nothing before me as to what sampling was taken in order to arrive at these figures or to what geographical areas they apply. In any event, however, all that such figures indicate is that there is a substantial representation of all income groups among the voting population.[5]

Other "studies" referred to indicate that persons less likely to vote include not only those of lower economic groups but also women, those who have had less education, those who are younger, those who are newcomers to the community and those of certain faiths. Defendant's materials only succeed in showing the wide diversity which runs through both voter and non-voter categories.

In reality defendant would have me hold that a system of proportional representation should be devised for the procuring of prospective jurors. The courts have repeatedly rejected such a concept and I reject it here. As the Court of Appeals of this circuit pointed out in *United States* v. *Flynn,* supra, the concept of proportional representation "has never been a part of the Anglo-American jury system and, indeed, is repugnant to that system." It declined "to use our power of supervision to create a system of proportional representation on federal juries, even were such a goal attainable." (216 F.2d p. 388). See *United States* v. *Dennis,* supra; *Dow* v. *Carnegie-Illinois Steel Corp.,* supra; *Padgett* v. *Buxton-Smith Mercantile Co.,* supra; *United States* v. *Local 36 of International Fishermen,* supra; *United States* v. *Carrion,* supra.

The array under challenge here was drawn from the large majority of those who were eligible for jury service, a majority which contained representatives of every class or group in the community. The method of selection under attack is calculated to produce a much more representative cross-section than the system upheld in such cases involving challenge to federal jury selection as *United States* v. *Dennis,* supra; *United States* v. *Flynn,* supra; *Dow* v. *Carnegie-Illinois Steel Corp.,* supra; *Young* v. *United States,* supra; *United States* v. *Carrion,* supra, to name only a few, and in such cases arising under the equal protection and due process clause as *Fay* v. *New York,* supra; *Brown* v. *Allen,* supra; *Hoyt* v. *Florida,* 82 S.Ct. 159 (decided November 20, 1961).

The two cases on which the defendant primarily relies, *Thiel* v. *Southern Pacific Co.,* supra, and *Ballard* v. *United States,* supra, are in no way comparable to the case at bar.

In the Thiel case the judgment was reversed because daily wage earners were deliberately excluded by the jury officials selecting the array. In Ballard the conviction was reversed because women were systematically excluded. In both cases the exclusion was of a cohesive class, united by common interests, and the resulting arrays, therefore, were not representative of the communities from which they were drawn. None of the six groups, economic, social, religious, racial, political and geographical, which were listed in the Thiel case as non-excludable, have been excluded here. Non-voters come from both sexes and from all economic, social, racial, religious, political and geographical groups. They comprise no cohesive group and their exclusion does not threaten the representative character of jury panels. Neither the Ballard nor the Thiel cases are applicable.

One thing remains to be mentioned on this phase of the case. Defendant, who at the outset of his motions urged that the method of selection was invalid because it was confined to registration lists, now urges that the process of selection is invalid because somewhat over 3% of qualification notices were sent over a period of ten years to prospective jurors whose names were selected from telephone directories and real estate listings. It is unnecessary to comment on this argument except to say that this small proportion could not possibly affect the representative character of the panel selected, even had anything definitive been shown as to characteristics of persons whose names appeared in these sources.

I therefore find that the methods employed in this district to select the persons on the list of qualified jurors from which this grand jury was drawn were reasonably designed to reach a representative cross-section of the community and there was no systematic exclusion of any cognizable group or class of qualified citizens from jury service. The system used was a fair and reasonable system which in its operation can be expected to result in the selection of adequate and proper grand juries.

II

Defendant also contends that, regardless of the considerations just discussed, the exclusive use of registration lists as a source of prospective jurors violates 28 U.S.C. § 1861 as amended by the Civil Rights Act of 1957, 71 Stat. 638, and that therefore his challenge must be sustained. He relies primarily on *United States* v. *Hoffa*, supra, recently decided in the United States District Court for the Southern District of Florida. It is defendant's position that *United States* v. *Hoffa* holds squarely that the exclusive use of voter or registration lists is forbidden by the 1957 Amendment.

The Hoffa case deals with circumstances in the Orlando Division of the Southern District of Florida which are quite different from those in the Southern District of New York. It does not hold that the exclusive use of voting or registration lists is forbidden by the 1957 Amendment under appropriate circumstances.

There is nothing in the language of § 1861 as written which can be construed to forbid the use of voter registration lists.

The defendant nevertheless contends that when the 1957 Amendment is read in the light of its legislative history it must be construed to forbid their exclusive use in order to carry out the purpose and intent of Congress. I find no support in the legislative history for this contention.

Prior to the enactment of the Civil Rights Act of 1957, Section 1861, in addition to practically the same qualifications for federal jury service as at present, provided that no person was qualified to serve as a federal juror unless "he [was] competent to serve as a grand or petit juror by the law of the State in which the district court is held."[6]

In 1941 "there were 48 different sets of qualifications and 68 general classes of possible grounds of exemption throughout the various states. Women were not qualified to serve as jurors in 18 states * * *." Report of the Judicial Conference Committee, op. cit. supra, p. 35.[7] As a result of the 1957 amendment not only were the requirements made uniform throughout the federal judicial system but "[l]arge groups of intelligent, qualified citizens, including women and professional people, previously unavailable by reason of disqualification or exemption under state law have been rendered eligible for federal jury service." Id. at p. 17.

The Civil Rights Act of 1957 was of broad scope and provided for the establishment of the Commission on Civil Rights, for an additional assistant attorney general to assist in civil rights matters, for the strengthening civil rights statutes, for means of further securing and protecting the right to vote, and for trial by jury in proceedings to punish criminal contempts growing out of civil rights cases. The amendment of § 1861 dealing with qualifications of federal jurors was contained in the last section of the Act and was incidental to its main purposes.

The most controversial feature of the Civil Rights Act as originally proposed was the provision that would have done away with jury trials in contempt proceedings for failure to comply with federal court orders which arise out of civil rights cases.

This provision became so highly controversial and aroused such bitter opposition in the Senate that it threatened passage of the entire bill. In an attempt at compromise and to smooth the way for passage of the legislation, Senator O'Mahoney offered an amendment providing for trial by jury in criminal contempt proceedings arising out of civil rights cases. 103 Cong.Rec. 11003, et seq. (1957). This amendment was opposed by a number of those backing the original bill on the ground that it emasculated the powers of the federal courts to enforce provisions concerning the right to vote. They pointed out that in various southern states Negroes were excluded from jury service under state law and thus would also be excluded from federal juries under the conformity clause of § 1861, and that it would be difficult if not impossible to secure convictions in civil rights contempt cases before southern juries so constituted. See remarks of Senator Javits, 103 Cong.Rec. 11566 to 11568 (1957). A heated debate on the original provision of the bill and the O'Mahoney amendment continued spasmodically for weeks. Finally, on July 31, 1957 Senator Church proposed an amendment of the O'Mahoney amendment by which the conformity clause of § 1861 would be deleted from the section entirely. He stated the purpose of the amendment to be as follows:

> "Mr. President, the amendment is designed to eliminate whatever basis there may be for the charge that the efficacy of trial by jury in the Federal courts is weakened by the fact that, in some areas, colored citizens, because of the operation of State laws, are prevented from serving as jurors. Thus the argument has been made that no jury trial should be permitted in civil rights cases, even in a proceeding for criminal contempt, because such cases concern relationships between the races, and in the South they would be tried by an all-white jury.
>
> "Mr. President, the cases which will be brought under any civil-rights bill will be prosecuted in Federal courts. *There is no reason why Congress should not modify Federal law so as to safeguard against discrimination on the basis of race, color, or creed, in the selection of jurors who are to serve in Federal courts.*
>
> "We believe the amendment we have now incorporated in the Record will accomplish at least three important and long overdue objectives:
>
> "First. It will establish reasonable and uniform qualifications for jurors serving in Federal courts, eliminating the 48 different sets of qualifications which now obtain. This is in complete accord with the generally accepted principle that Federal rules should govern Federal practice.
>
> "Second. It will place the selection of jurors entirely in the hands of the Federal courts, thus avoiding practices under State law that, in effect, may systematically exclude citizens from jury duty in Federal courts on account of race or color.
>
> "Third. Through the accomplishment of the above two objectives, it will confer another civil right—the right to serve as a juror—on a large segment of colored citizens, who now, in practice, may be prevented from doing so.
>
> "Mr. President, we believe the amendment constitutes a great step forward in the field of civil rights. We believe also that it can contribute significantly in forwarding the cause to which most of us are dedicated—the cause of enacting a civil-rights bill in this Session of the Congress." (Emphasis added). 103 Cong.Rec. 13154 (1957).

A number of other Senators, speaking in support of the Church amendment, presented the same arguments. See, e.g., Senator Kefauver, id. at p. 13154; Senator O'Mahoney, id. at p. 13156; Senator Case, ibid.

Nowhere in the debates was there any indication that Congress intended to prescribe methods by which jury officials should select qualified jurors in the federal courts. Nor was there any hint that the use of state voter registration lists, exclusively or otherwise, should be forbidden. The discussion as to voting lists was directed entirely at the elimination from federal jury requirements of state qualifications based on state laws which excluded Negroes from voting.

Plainly had Congress intended either to prescribe the specific methods to be used by federal jury officials to obtain qualified jurors or to proscribe the use of particular methods, it would have said so in so many words. It not only failed to do so but there is no indication that it had any such intent.

Defendant claims that Congress intended the 1957 Amendment to § 1861 to have "collateral benefits" and that these must be taken to have forbidden the exclusive use of state voter registration lists as a source of federal jurors. Though Senator Kennedy used the term "collateral benefits" at one point during the course of the debates, id. at p. 13306, his remarks do not even hint at the meaning for which defendant contends.

There is no indication that Congress intended to establish uniform methods of selecting qualified jurors or to forbid the use of any method reasonably calculated to produce a representative cross-section of the community. Indeed, as the Judicial Conference Committee stated only last year (Op. cit. supra, at pp. 25-26):

> "It still does not seem feasible or desirable to draft detailed regulations to cover the preparation of jury lists throughout the United States, considering the great diversity of local, economic and social conditions found in the several districts."

The test is not whether voter registration lists are used, exclusively or otherwise, as a source of qualified jurors. The test is whether or not the use of such lists results in an array which is a representative cross-section of the community or from which a cognizable group or class of qualified citizens is systematically excluded under the doctrine of the Thiel, Ballard and Glasser cases.

United States v. *Hoffa* is an illustration. There, in three of the four counties involved (Orange, Osceola and Brevard) the names taken by the jury commissioner and the deputy clerk were supplied solely from lists of jurors who had been selected for service in the state courts. The federal jury officials took names given them by state officials without exercising independent selection of their own. In the case of women selections were thus limited to the small number who had volunteered for jury service in the state court. In the other county selections were limited to the relatively low percentage of the population which registered to vote.

The court found that "the percentage of qualified citizens deliberately excluded from serving on the jury was extremely high" (*United States* v. *Hoffa*, supra, 196 F.Supp. p. 29) and that all women were systematically excluded from jury service except the very few who registered for jury service in the state courts. It held that the resulting array was not a fair representation of the community and that moreover the jury officials had not exercised their own discretion in selecting a large part of the array. It was for these reasons that the challenge to the array was sustained and the indictment dismissed.

In this district, as I have pointed out, the facts and circumstances are entirely different. The use of the voter registration lists and the procedures followed by the jury commissioner and the deputy clerk in selecting names from them was reasonably designed to produce an array which was a representative cross-section of the community and no group or class was systematically excluded. The methods used in this district are in accordance with accepted and required standards of jury selection and in conformity with law. They are calculated to produce fair, impartial and adequate grand and petit juries.

The defendant's challenge to the grand jury array is therefore without merit and his motions to dismiss the indictments upon the ground that the grand jury returning them was not selected, drawn or summoned in accordance with law is in all respects denied.

It is so ordered.

NOTES

1. This figure represents the 1960 census total of 2,749,702 adults residing in the three counties, less 221,550 registered aliens in these counties in 1958, the last year in which the number of aliens was tabulated on a county basis.

2. This is in contrast to the requirements for raising a federal constitutional question upon challenge to a jury selected in the state courts. There the challenge is based solely on the equal protection and due process clauses of the Fourteenth Amend-

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ment and a showing of actual prejudice is required. See, e.g., *Strauder* v. *West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879); *Garter* v. *State of Texas*, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839 (1900); *Hernandez* v. *State of Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Eubanks* v. *State of Louisiana*, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958).

3. The Report of Judicial Conference Committee on the Operation of the Jury System, op. cit. supra, recommends: "The choice of specific sources from which names of prospective jurors are selected must be entrusted to the clerk and jury commissioner, acting under the direction of the district judge, but should be controlled by the following considerations: (1) the sources should be coordinated to include all groups in the community; (2) economic and social status including race and color should be considered for the sole purpose of preventing discrimination or quota selection; (3) women are now eligible by law for jury service in federal courts and they should be selected and called to serve without discrimination on account of sex; (4) political affiliation should be ignored; (5) generally speaking, unsolicited requests of persons who seek to have their names placed upon jury lists should be denied and unsolicited recommendations of names should not be recognized; and, (6) in determining the parts of the district from which jurors are to be drawn, the courts should bear in mind the desirability of conserving the time of jurors and preventing exorbitant travel expense to the government." (p. 13).

4. Knox Committee Report of 1942 at p. 13, as quoted at p. 17 in the Report of the Judicial Conference Committee on the Operation of the Jury System, op. cit. supra.

5. Defendant urges that the home addresses of the members of the grand jury which returned these indictments indicate that they come from "high income" areas or communities and that it therefore should be inferred that the method of selection employed does not produce representative grand juries. The inference that all jurors who live in these areas are necessarily from a "high income" group is unsupported. But even if they were this is irrelevant to the issues raised on this motion. An entirely proper method of jury selection may produce a given jury quite unrepresentative of the community, just as improper methods of selection may result in an entirely representative jury. See *Dow* v. *Carnegie-Illinois Steel Corp.;* supra, 224 F.2d p. 422.

6. Prior to 1957 this section merely required that the prospective juror reside in the district. The 1957 amendment changed this requirement to a minimum of one year residence in the district.

7. "Accountants and actuaries were relieved of jury service in Alabama and Florida; chiropodists in California, Missouri and Rhode Island; linotype operators in North Carolina; and professional gamblers in Colorado and Mississippi." Report of Judicial Conferences Committee, op. cit. supra, note 43.

Rafael A. PABON, on behalf of himself
and all other persons similarly
situated, Plaintiffs,
v.
Louis J. LEVINE, Individually and in his
official capacity as Industrial Commissioner
of the State of New York, et al., Defendants.
No. 75 Civil 1067.

United States District Court,
S.D. New York.
March 15, 1976.

Oscar Garcia-Rivera, Herbert Teitelbaum, Manuel del Valle, Richard J. Hiller, Puerto Rican Legal Defense & Education Fund, Inc., New York City, for plaintiffs.

Louis J. Lefkowitz, Atty. Gen. of the State of New York, New York City, for defendants; George D. Zuckerman, Judith T. Kramer, Arnold D. Fleischer, Asst. Attys. Gen., New York City, of counsel.

OPINION

EDWARD WEINFELD,
District Judge.

Plaintiff is a citizen of the United States who was born in Puerto Rico and who is fluent in Spanish, but who, according to his complaint, "speaks virtually no English and cannot read, nor write English." He claims that he was unlawfully deprived of unemployment insurance benefits by defendants, officials of the State of New York and the State Department of Labor, because all materials pertaining to his right to assert his claim for such benefits and to appeal from an adverse decision were printed in English. The claim, which is also advanced on behalf of all other persons similarly situated, is predicated upon an alleged violation of rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and under 42 U.S.C., section 2000d, and regulations promulgated thereunder.[1]

In broad terms the complaint alleges that Puerto Rican and other Hispanic persons who have applied or will apply for unemployment benefits and who, by reason of their English language difficulties, are prevented from understanding documents and notices issued by the defendants in English only, are deprived of their rights to unemployment benefits and discriminated against by defendants, who print the documents in the English language and fail to provide an adequate number of interpreters.

Insofar as the individual plaintiff is concerned, the objective facts as alleged in the complaint may be briefly stated. He alleges that he applied for unemployment insurance benefits; that he received notices of denial of his claim which were written in the English language, which he did not understand and which were not explained to him; that he had no way of knowing that to preserve his rights he was required to request a hearing before the Unemployment Insurance Referee within thirty days of the receipt of the notices; that the Unemployment Insurance Referee Section held that since his request for a hearing had been untimely it was without jurisdiction to review plaintiff's claim; and that upon appeal the Referee's decision on the jurisdictional ground was upheld. Thus, plaintiff has never had a hearing on the merits of his claim, and he alleges that he was deprived of his unemployment insurance benefits "because the English language notice of his rights was incomprehensible to him."

Defendants' Motion for Summary Judgment

The defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. They make a two-pronged argument. First, they assert that "[i]n fact, plaintiff participated in the unemployment insurance system successfully." In support they have filed, as required by Local Rule 9(g), a statement of material facts which they claim are undisputed.[2] Here defendants list a number of factual matters relating to the filing and processing of plaintiff's claim from its inception to ultimate denial. However, plaintiff has responded and challenged the accuracy of many of these crucial facts. Thus, although plaintiff admits that he signed various forms, he denies that he understood what he was signing, since the forms were all printed in English. Further, he denies that the notice of a thirty-day limit on his time to appeal was read or explained to him by his daughter. He disputes that he testified at the Referee's hearing that he did not file in time because he expected a favorable decision on a pending union arbitration proceeding. Rather, he claims that he testified that "he did not understand the procedures of the unemployment insurance system, and, in particular, the 30 day appeal period requirement." Finally, plaintiff asserts that he never received any of the literature printed in Spanish, which defendants claim was available, and denies defendants' statement that there are 197 Spanish-speaking employees in the Unemployment Insurance Division in the metropolitan area. Thus, despite defendants' contention to the contrary, the case bristles with disputed issues of fact as to whether the events relating to the processing of plaintiff's claim and procedures and practices employed by defendants with respect to non-English speaking claimants denied plaintiff an effective right of review of the denial of his claim for benefits. This aspect of the motion for summary judgment must be denied.[3]

However, defendants alternatively seek summary judgment on the ground that "[n]either the Constitution of the United States nor any state or federal statute requires the Division to conduct its business or any portion thereof in Spanish or any other foreign language in order to accommodate non-English speaking persons." Plaintiff, to sustain his constitutional claim, relies upon the equal protection and due process clauses of the Fourteenth Amendment. To sustain his statutory claim, he relies on section 601 of Title VI of the Civil Rights Act of 1964.[4]

It is unnecessary to consider at this time plaintiff's constitutional claim, since plaintiff's claim under the Civil Rights Act of 1964 is substantial and presents a genuine issue of material fact which forecloses summary judgment.[5]

Section 601 of the Act bans discrimination "on the ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance." Defendant New York State Department of Labor is a recipient of such federal funds in its role of administrator of the state's unemployment insurance program. Plaintiff alleges that "defendants' failure to employ sufficient numbers of Spanish-speaking personnel . . . and . . . their failure to print and provide bilingual applications, forms . . . [and] notices" has a "discriminatory impact" on him and others, and therefore violates the statute.

The recent Supreme Court decision in *Lau* v. *Nichols*[6] gives strong support to plaintiff's claim. In *Lau*, the Court held the failure of a school system to provide non-English speaking Chinese students with English language instruction or to provide them with other adequate instructional procedures denied them a meaningful opportunity to participate in the public educational program and thus was a violation of section 601.

The Court anchored its opinion to the regulations and guidelines promulgated by the Department of Health, Education, and Welfare to effectuate section 601 in the context of federally assisted school systems. The regulations relied upon by the Court are virtually identical to those established by the Department of Labor to carry out the purpose of section 601 in federally assisted labor programs such as the program which is the subject of plaintiff's claim. Thus, the Court quoted HEW regulation 45 C.F.R. § 80.3(b)(1), which specifies that recipients of federal aid may not

> "(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> "(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program."[7]

These regulations are identical to Department of Labor regulations as to recipients of federally assisted labor programs.[8]

The Court further quoted the HEW regulation that a recipient

> " 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or have 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin,' "[9]

which is identical to the Department of Labor regulation on this subject.[10]

Relying essentially on these three HEW regulations, the Court held that "[d]iscrimination is barred which has that *effect* even though no purposeful design is present,"[11] and further stated that:

> "It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations."[12]

Applying the Supreme Court's reasoning in *Lau* to the instant case, this Court finds that plaintiff, under his allegations that the Spanish, non-English speaking minority receive fewer benefits than the English-speaking majority from the unemployment benefits program, states a claim of discrimination upon which relief may be granted under the Department of Labor regulations promulgated to effectuate section 601 as applied to federally assisted labor programs.

Defendants, however, argue that summary judgment is nonetheless warranted because plaintiff has failed to satisfy the test adopted by the Tenth Circuit in *Serna* v. *Portales Municipal Schools*[13] that "only when a substantial group is being deprived . . . will a Title VI violation exist." While this Court agrees that "numbers are at the heart of [the] case,"[14] whether a "substantial group" exists here is a disputed fact issue, the determination of which must await trial. Accordingly, defendants' motion for summary judgment is denied for failure to demonstrate that there are no genuine issues of material fact.

Plaintiff's Motion for Class Certification

The Court's decision on plaintiff's motion for class action certification also turns upon the number of individuals who ultimately will be found to be included in the class. Plaintiff seeks to represent a class of all

> "Puerto Rican and other Hispanic persons who have applied or will apply for unemployment benefits and, who, by reason of their English language difficulties, are prevented from understanding formal documents and notices promulgated by the defendants in only the English language and from otherwise communicating with Department personnel."

At present, plaintiff has not established that there are, as he alleges, "thousands" of persons who have been handicapped to the point of injury by their inability to speak English in their dealings with defendants. If, as defendants contend, defendants "provide extensive assistance to Spanish speaking persons,"[15] the class may be quite small indeed. This is highlighted by the circumstance that this action was commenced by a different plaintiff purporting to assert class action claims. It developed he had not been deprived of his rights, as alleged. Thereupon the action was dismissed as to that plaintiff and the complaint amended to substitute the present plaintiff, who adopted the prior plaintiff's allegations with respect to the class action claims. This Court cannot now find that Rule 23(a)(1), which requires that "the class [be] so numerous that joinder of all members is impracticable" for a class action to be maintainable, is satisfied.

The motion for class action certification is denied without prejudice to renewal.

NOTES

1. 29 C.F.R. §§ 31.1-.12 (1975).

2. "[T]here shall be annexed to the motion a separate short and concise statement of material facts as to which the moving party contends there is no genuine issue to be tried."

3. Cf. *Heyman* v. *Commerce & Indus. Ins. Co.*, 524 F.2d 1317 (2d Cir. 1975).

4. 42 U.S.C. § 2000d.

5. See *Lau* v. *Nichols*, 414 U.S. 563, 566, 94 S.Ct. 786, 788, 39 L.Ed.2d 1, 4 (1974). Cf. *United States* v. *Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228, 44 U.S.L.W. 4010 (1975); *Dandridge* v. *Williams*, 397 U.S. 471, 475-76, 90 S.Ct. 1153, 1156-57, 25 L.Ed.2d 491, 496-97 (1970).

6. 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

7. 414 U.S. at 567, 94 S.Ct. at 789, 39 L.Ed.2d at 5.

8. See 29 C.F.R. § 31.3(b)(1)(ii) (1975), 29 C.F.R. § 31.3(b)(1)(iv) (1975).

9. 414 U.S. at 568, 94 S.Ct. at 789, 39 L.Ed.2d at 5, *quoting* 45 C.F.R. § 80.3(b)(2).

10. See 29 C.F.R. § 31.3(b)(2) (1975).

11. 414 U.S. at 568, 94 S.Ct. at 789, 39 L.Ed.2d at 5 (emphasis original).

12. Id.

13. 499 F.2d 1147, 1154 (10th Cir. 1974).

14. *Lau* v. *Nichols*, 414 U.S. 563, 572, 94 S.Ct. 786, 791, 39 L.Ed.2d 1, 8 (1974) (Blackmun, J., concurring).

15. Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification, p. 9.

Uldine KURI, on behalf of herself, her
minor child, Angela, and all others similarly
situated, et al., Plaintiffs-Appellants.
v.
Joel EDELMAN, Individually, and in his capacity
as Director of the Illinois Department
of Public Aid, Defendant-Appellee.

No. 74-1093.

United States Court of Appeals,
Seventh Circuit.
Feb. 11, 1974.

Robert E. Lehrer, Legal Asst. Foundation of Chicago, Chicago, Ill., Michael F. Lefkow, Chicago Ill., for plaintiffs-appellants.

William J. Scott, Atty. Gen., Chicago, Ill., for defendant-appellee.

Before CUMMINGS, PELL, and STEVENS, Circuit Judges.

PELL, Circuit Judge.

The State of Illinois participates in the federally funded Aid To Families with Dependent Children (AFDC) program established under Title IV-A of the Social Security Act, 42 U.S.C. § 601 et seq. The several plaintiffs filed their action in the district court on December 18, 1973, alleging that the defendant Joel Edelman, individually and in his capacity as Director of the Illinois Department of Public Aid, was implementing a program of suspending AFDC recipients from assistance in violation of their rights under 42 U.S.C. § 601 et seq. (Social Security Act, § 401 et seq.) and 42 U.S.C. § 1983 (Civil Rights Act), the Supremacy Clause, and the Fourteenth Amendment. Plaintiffs, on behalf of themselves and members of their class (recipients of assistance), sought declaratory and injunctive relief restraining implementation of the alleged illegal program. A hearing was held in the district court on January 30, 1974, at the conclusion of which the district court denied a preliminary injunction. This appeal followed. The plaintiffs filed a motion for an injunction pending appeal, which was denied by the district court, and the case is presently before this court on the motion filed here by plaintiffs for an injunction pending the appeal.

Plaintiffs contend that benefit checks will be withheld beginning February 1, 1974, from plaintiffs and members of their class, and that an injunction pending appeal is necessary to preserve the status quo and effective appellate review of the denial of the preliminary injunction by the district court.

As background for consideration of the present matter, on or about November 8, 1973, the defendant instituted a new Illinois Department of Public Aid income reporting program.

The apparent reason for this program was because of continuing obligation on the defendant to provide the assistance program only to those eligible, which in turn involves the existence of need and dependency.

An IBM card DPA 43a, with an accompanying information notice, was mailed to the "grantee relative" of each Illinois family receiving AFDC benefits. The card called for a report on income and the notice advised that the executed form must be returned to Springfield within 15 days to continue eligibility for Aid to Dependent Children.

As the matter is put by the defendant, the 43a form is not intended itself to be a guideline or instrument for eligibility for public assistance, "but is merely intended and used by the Department to be an informational tool so as to afford the defendant an opportunity to conform with federal guidelines which require the individual states to remove those people from the public assistance rolls who are ineligible for said assistance." Further, we note the assertion of the defendant, which does not appear to be denied, that the defendant's forms and program have been stated by the Department of Health, Education and Welfare not to be in conflict with federal regulations.

Suspension notices were mailed to the relatives if the Springfield Office of the Illinois Department did not receive the form 43a within the specified time period.

The suspension notice, which was a followup of the original request, reads as follows:

> "This is to inform you that the Department of Public Aid, Springfield, will suspend your assistance/food stamp benefits under the Aid to Families with Dependent Children program because you failed to return the Income Report Form, DPA 43a, mailed to you on
>
> "The Department of Public Aid will not take action to suspend your assistance/food stamp benefits if you will return Illinois Department of Public Aid Income Report Form DPA 43a in the enclosed envelope within 15 days of the date of this notice. If you have lost the card, complete the reverse side of this Notice and return this Notice.
>
> "If you believe our intended action is wrong, you may, if you wish, meet with a representative of the County Department/District Office to be further informed about our reasons for taking this action concerning your assistance/food stamp benefits. You will be given the opportunity to present any information or evidence which you believe might affect this decision. The meeting will be informal. If you wish, you may bring another person with you to assist you or to present information or evidence for you.
>
> "Your right to appeal the Illinois Department of Public Aid's action, whether or not you meet with its representative, is not affected by your decision. At any time within 60 days after the date of this Notice, you have the right to appeal for a fair hearing to the Illinois Department of Public Aid. However, your assistance benefits may be continued at its present level if you appeal within 15 days of the date this Notice was mailed. Any County Department/District Office will provide you with the appeal form and will assist you in its completion if you wish."

It is asserted in the motion before the court that some 31,000 families are involved. However, it also appears in the file that some 86% of the recipients of the original notice have now complied with the requirement of furnishing the information on other income.[1] The principal thrust of the motion is that the form is vague and not understandable, which would seem to be belied by the substantial return, and that many of the recipients understand only the Spanish language and therefore were unable to respond.

The English language has been uniformly used at all times in connection with all correspondence and forms sent to welfare assistance recipients. The suspension notice form, while in English, makes it clear that informal procedures will be engaged in if the recipient calls at a local office for the purpose of restoring families to the receiving rolls if eligible.

While the complaint is made that many of the recipients only read and comprehend the Spanish language, there is no showing that this is the actual cause of recipients not returning the requested information. As far as we can tell from the record, the most significant factor for not returning the information may have been because the non-returners realized that other income available to them would preclude the payment of assistance. Nor is there any showing that there are not other language groups who may be unable to comprehend English. In sum, the matter of the reason for some recipients not complying with either of the two requests lies in the realm of conjecture.

As the defendant points out, the information requested is not vague but is similar to that the recipients had to furnish when they originally requested assistance under the program.

The plaintiffs rely heavily on a case which had not been decided when they filed their original complaint. *Lau* v. *Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).[2] We do not find *Lau* apposite to the problem here involved. That case was concerned with unequal educational opportunities under the Civil Rights Act of 1964 with particular reference to Chinese students in the San Francisco school system who do not speak English. The plaintiffs there did not necessarily seek a remedy that instructions be given in Chinese but only that as the school system presently operated they were denied a meaningful opportunity to participate in it. Petitioners only requested that the Board of Education be directed to apply its expertise to the problem and rectify the situation. The judgment below was reversed and remanded for the purpose of fashioning appropriate relief.

Here the ultimate purpose is to require notices to be sent out in the Spanish language without regard to the fact that there are presently informal procedures available in Spanish speaking areas which will enable those who cannot speak English nevertheless to comply.

Plaintiffs also cite *Puerto Rican Organization for Political Action* v. *Kusper,* 490 F.2d 575 (7th Cir. 1973). However, that case dealt not with Spanish speaking people per se but with citizens of the United States by virtue of their birth in Puerto Rico. These people were educated in Puerto Rican public schools where the language of instruction is Spanish. The matter of Puerto Ricans voting had been the subject of Congressional attention, 42 U.S.C. § 1973b(e)(2). The case is of no help to plaintiffs in the present case.

The case brought to our attention, which is closest to the present case, is *Guerrero* v. *Carleson,* 9 Cal.3d 808, 109 Cal.Rptr. 201, 512 P.2d 833 (Cal.1973), cert. denied, 414 U.S. 1137, 94 S.Ct. 883, 38 L.Ed.2d 762 (1974). In that case the California Supreme Court thoroughly analyzed the present problem and sustained the denial of a preliminary injunction in a situation comparable to the case at bar.

The relief requested in this court at the present time has been termed an extraordinary remedy. *Belcher* v. *Birmingham Trust National Bank,* 395 F.2d 1685, 686 (5th Cir. 1968). One of the primary considerations for this court's present determinations must be whether the appellants have made a strong showing that they are likely to prevail on the merits of their appeal, which in this case is from the denial of a preliminary injunction. *Miltenberger* v. *Chesapeake & Ohio Railway,* 450 F.2d 971, 974 (4th Cir. 1971).

The procedures followed by the defendant present a strong case of advance notice with reasonable opportunity for recipients to avoid having their assistance terminated. See *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). We have no inclination to say that the state is not entitled to impose reasonable requirements on benefit recipients to determine whether they are on a continuing basis entitled to such benefits because of need and dependency. Indeed, even without receipt of a 43a form, recipients are under a statutory continuing duty to report changes in circumstances. Ill.Rev.Stat. ch. 23, § 11-19.

On the record before us, we do not find a basis for granting the extraordinary relief requested, the apparent effect of which would be to require as a mandatory matter the appellee Edelman to disburse some 30,000 checks under the AFDC, as to which there is no clear showing that there is legal entitlement in the proposed recipients.

Accordingly, the motion for injunction pending appeal is denied.

It is so ordered.

NOTES

1. In an amended complaint plaintiffs proposed to file, it appears that the Department had mailed the 43a form to the heads of 220,000 families in Illinois. The estimated number of those recipients who have failed to report, as gleaned from pleadings and briefs of the plaintiffs, ranges from 16,000 to 38,000 families. The plaintiffs seem to have settled on 31,000 families in the present motion.

2. The district court in denying a preliminary injunction did give consideration to *Lau*.

Economic Access

Damian FRONTERA on his own behalf
and on behalf of all others similarly
situated, Plaintiff-Appellant
v.
David I. SINDELL et al.,
Defendants-Appellees.

No. 75-1038.

United States Court of Appeals,
Sixth Circuit.
Aug. 25, 1975.

Kenneth Montlack, Cleveland, Ohio, for plaintiff-appellant.

William J. Brown, Atty. Gen., Andrew J. Ruzicho, Gene W. Holliker, Asst. Attys. Gen., Civ. Rights Section, Columbus, Ohio, for amicus curiae Ohio Civil Rights Commission.

James B. Davis, Robert W. Jones, Cleveland, Ohio, for defendants-appellees.

William Louis Tabac, Gary T. Kelder, Cleveland State University, Cleveland-Marshall College of Law, Cleveland, Ohio, for amicus curiae American Civil Liberties Union/ Cleveland Chapter.

Before PHILLIPS, Chief Judge, and WEICK and ENGEL, Circuit Judges.

WEICK, Circuit Judge.

Plaintiff, Frontera, instituted a class action in the District Court in behalf of himself and all Spanish speaking persons, including persons of Puerto Rican and Spanish-American ancestry, against the Civil Service Commission of the City of Cleveland and the Commissioner of Airports.

Frontera alleged in his complaint that he had been employed as a carpenter at the Cleveland Hopkins Airport under temporary appointment, and that he applied for and took the examination for carpenter permanent appointment, which examination was conducted by the Commission.

Frontera failed to pass the examination and was not certified for the appointment. He claimed that he failed because the examination was conducted in the English language and not in Spanish, and that he did not understand some of the language. In his complaint he sought an injunction to restrain the Commission

> . . . from maintaining a policy, practice, custom or usage of discrimination against plaintiff and other Spanish-speaking persons in his class because of national and ethnic origin and ancestry by (a) refusing to provide pre-examination announcements and literature in the Spanish language; (b) refusing to administer examination instructions in the Spanish language; (c) refusing to provide the written Civil Service examinations for positions in the City of Cleveland in the Spanish language; and (d) refusing to provide retesting with appropriate safeguards, including the use of Spanish instructions and test material,

for Plaintiff and other Spanish-speaking persons denied equal opportunities and protection under the law. (A. 7)

Frontera alleged that his Fourteenth Amendment rights and civil rights under 42 U.S.C. §§ 1981, 1983 and 1985 had been violated and he prayed for damages in addition to injunctive relief.

The case was tried before the District Court on the evidence and arguments of counsel. The Court determined that the case was a proper class action. The Court, in a written opinion in which it adopted findings of fact and conclusions of law, upheld the right of the Commission to conduct the examinations in English. Frontera appealed. We affirm.

Frontera was born in Puerto Rico and educated there through the fourth grade. He moved from Puerto Rico to Cleveland in 1953 at the age of 28. Frontera speaks English poorly and can read basic English only with great difficulty. He is a member of the Carpenter's Union local, having been admitted to the Union on the basis of an oral test and an inspection of his carpentry work.

Counsel stipulated that Frontera has substantial skill as a carpenter. He was a good "handyman."

The position of carpenter permanent appointment for which he applied was one of the highest paid positions in the City of Cleveland. Craftsmen are paid at rates which sometimes exceed that of Commissioners in the various divisions.

Frontera competently performed his job at the airport under the temporary appointment. Frontera's problem with the English language did not interfere with communication between his supervisor and him, nor did it interfere with the performance of the work assigned him. Carpenters at the airport did not work from blueprints, but rather worked from verbal instructions, sketches and work orders. He generally understood his supervisor's instructions and would ask questions if they were necessary to clarify his instructions, and he had no difficulty with the sketches.

The Civil Service Commission announced an examination for the skilled crafts on April 13, 1970.[1] Frontera applied to take the carpenters' examination. The examination was scheduled for May 20, 1970. Frontera contacted several people in an effort to have the test administered to him in Spanish. He was informed that he would be able to take the test in Spanish and on May 18, 1970 the Commission formally voted to have the test translated if possible. However, due to a lack of both time and a trade dictionary for translating the technical terms in the carpentry test, the Civil Service employee who had been given the assignment of translating the test was unable to do so. Therefore, the test was administered only in English.

Frontera did examine some text books which his daughter and wife obtained for him at the Municipal Reference Library but he testified that he did not understand the books. He asked no one to help him prepare for the examination.

The test consisted of a performance section in which the applicants constructed a wooden frame and a written section in which the applicants were asked questions dealing with carpentry. An applicant could score 50 points on each section of the test. A minimum score of 70 points was required to pass the test. Frontera failed the test, scoring 36 points on the performance section and 31.349 points on the written section. He ranked 103rd of the 127 applicants. Concerning the performance section of the test, Frontera testified that he did not understand that he was allowed to use clamps to help construct the frame which clamps were on the work table. The instructions for the performance section were given orally in English. Frontera testified that he did not understand all of the instructions and that he did not ask any questions. The examiner who administered the performance section of the examination testified that nothing was said at the examination concerning the tools the applicants could use, and that instructions were that the applicants were to build the object shown in a sketch given the applicants within a specified time.

Concerning the written section of the test, Frontera testified that he was unable to understand several of the words in the questions. He was cross-examined concerning several of the test questions and testified that he did not know what "beading work" was, nor what "factory or shop lumber" was. Concerning the statement "Cedar wood is considered to be decay resisting," he testified that he did not understand the meaning of the word "decay." It should be noted that the words or terms that Frontera indicated that he did not understand dealt with the craft of carpentry. The test did not require verbal ability unrelated to the craft of carpentry.

The plaintiffs' statistical evidence, based upon the 1970 census, indicated that persons of Spanish nationality comprised 1.86% of the Cleveland population and 1.22% of the Cuyahoga County population. There were 545 Spanish-speaking craftsmen and kindred workers residing in the city of Cleveland. (Pl. Exh. A & M). In 1973, Spanish surnamed Americans comprised approximately .5% of the employees of the city of Cleveland, but none of the 574 craft positions were filled by Spanish surnamed Americans.

There was no statistical evidence of the number of Spanish surnamed Americans employed by the city of Cleveland in 1970 and no evidence of comparative pass rates for Spanish surnamed and other applicants, other than for the May, 1970 craft examinations.

The evidence was to the effect that Frontera was the only Spanish surnamed applicant taking the May, 1970 craft examinations; that witnesses involved in placing Spanish surnamed Americans for employment believed that more Spanish surnamed people would apply to take the Civil Service examinations if they were given in Spanish; and that some Spanish surnamed craftsmen who were witnesses would, in fact, apply to take the examinations if they were given in Spanish. The District Court was of the view that the failure to give Civil Service tests in Spanish does have a discriminatory impact on the Spanish speaking population.[2] Only one permanent appointment was made from the Civil Service list resulting from the May, 1970 carpenter's examination. The permanent appointment was made November 2, 1970 to the person receiving the highest grade. Frontera was furloughed from his job on November 20, 1970 in a massive layoff of employees due to the city's poor financial situation. Frontera's temporary job as carpenter at the airport has never been filled and the job has been eliminated as unnecessary.

In considering this case we are mindful of several facts which help to place the case in perspective. First, although Frontera criticizes the manner in which the test was constructed, his real complaint relates only to the language in which the test was advertised and administered. Second, there is no training program for carpenters hired from the Civil Service list. Carpenters are expected to possess the professional knowledge of the trade when they are hired. Third, the examination did not require a general proficiency in the English language. It used words and terms which ordinarily would be recognized and understood by a person knowledgeable in the carpentry trade.

The principal issue in this case is whether the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 require that information concerning a Civil Service examination be disseminated and the examination itself be administered in Spanish to Spanish-speaking applicants. We hold that they do not. This suit was not brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. or the 1972 amendments 42 U.S.C. § 2000e(a) and (b). We therefore have not considered these statutes and express no opinion with respect to them.

The District Judge was of the view that conducting the test in English does have some discriminatory effect upon the Spanish-speaking portion of the city's population. He held that his finding cast upon the defendants the burden of proving that there was a compelling governmental interest in giving Civil Service examinations in English. The Court reviewed the evidence and found that the defendants had met their burden of proof and established a compelling state interest in conducting the test in English. We agree.

The Court relied on Article XV Section 10 of the Constitution of Ohio which provides:

> Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examination . . .

Before Civil Service, the spoils system was in vogue where patronage was dispensed by the political party in power. The elimination of this practice was of such great importance to the people of Ohio that they dealt with it in their Constitution.

Circuit Judge Levin Campbell who wrote the opinion for the Court in *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1022 (1st Cir. 1974) indicated that we ought not to discourage the use of tests and reopen the doors to political selection. He stated:

> In fairness to the state, we must not forget that civil service tests were instituted to replace the evils of a subjective hiring process. Little will be gained by minorities if courts so discourage the use of tests that the doors to political selection are reopened. Moreover, a test, even one the cutoff of which does not demonstrably predict job performance, may serve worthwhile goals in gross by sifting from the pool of potential applicants those without enough motivation even to try to acquire the skills the test demands, and by discarding some few candidates who take the test but whose mental ability is so low that they are obviously unsuitable. Finally, it is virtually impossible for an employer to justify to a mathematical certainty every selection device.

As we noted earlier, the words and terms which Frontera was unable to understand would ordinarily be recognized and understood by a person knowledgeable in the craft. Since there is no training program for carpenters or others in the skilled trades, and the requirements for applicants set out in the announcement include the requirement of carpentry experience, the Commission could assume that an applicant would be familiar with such terminology. At the very least, use of such terminology would not ordinarily interfere with the test's objective of identifying competent carpenters and ranking them for Civil Service.

The Commission contended that it would be unreasonable to expect it to translate examinations into the various languages prevalent in a cosmopolitan community. The testimony of employees of the Commission clearly revealed the limited resources of the Commission. The Commission further contended that any form of test, other than a written test, would tend to interject the subjective judgment of examiners into the scoring process and could be manipulated to achieve the very sort of discrimination which the plaintiffs alleged. Essentially the Commission claimed that the Civil Service system itself required the use of English, generally, for its successful operation. There is not an iota of evidence tending to prove that the Commission, in conducting the examination in English, discriminated against the plaintiff on account of his nationality or against any other nationality.

The findings of fact adopted by the District Court that plaintiff had established a prima facie case of discrimination are not supported by substantial evidence and are clearly erroneous.

If Civil Service examinations are required to be conducted in Spanish to satisfy a few persons who might want to take them, what about the numerous other nationality groups which inhabit metropolitan Cleveland? These other nationality groups would have just as much right as Frontera to have their examinations conducted in their own languages. The city could not conduct examinations in Spanish and deny other nationalities the same privilege. Denial to any would be invidious discrimination.

In order to accommodate all nationality groups, the city might be compelled to establish a department of languages with a staff of linguists to translate the tests and supervise them. This would, of course, be at the expense of the city which has severe financial problems at the present time and would ultimately be saddled upon the harried taxpayers of Cleveland.

The District Court in determining the obligations of the Commission should have applied the rational basis test rather than the compelling interest test.

As well stated by Mr. Justice Stewart in *Dandridge* v. *Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970):

> But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all . . . It is enough that the State's action be rationally based and free from invidious discrimination.

This is not a proper case in which to subject state action to strict judicial scrutiny. *San Antonio Independent Dist.* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

We are not dealing here with a suspect nationality or race.

It cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our legislatures conduct their business in English. Some states even designate English as the official language of the state, e.g. 127 Ill.Rev.Stat. § 177. Our national interest in English as the common language is exemplified by 8 U.S.C. § 1423, which requires, in general, English language literacy as a condition to naturalization as a United States citizen.

Statutes have been enacted which provide exceptions to our nation's policy in favor of the English language to protect other interests and carry out the policies of the Fourteenth Amendment,[3] but these exceptions do not detract from the policy or deny the interests the various levels of government have in dealing with the citizenry in a common language.

We have not been favored by the plaintiff or any of the amicus curiae with the citation of a single case holding that Civil Service examinations must be conducted in foreign languages whenever requested by a nationality group and that failure to comply with such requests violates the constitutional or civil rights of the individuals composing such group.

A somewhat analogous situation was before the Ninth Circuit in *Carmona* v. *Sheffield*, 475 F.2d 738 (9th Cir. 1973) where a group of Spanish-speaking citizens claimed that they were denied their constitutional and civil rights because the state of California did not provide them with Spanish-speaking interviewers to assist them in the processing of their claims for benefits of unemployment insurance and did not send out notices and other communications to them in Spanish. The court in rejecting these claims stated:

> We believe that the additional burdens imposed on California's finite resources and California's interest in having to deal [with] only one language with all its citizens support the conclusion of reasonableness.

(Id. 739) citing *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

The decision of the Supreme Court in *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) relied upon by the plaintiff is inapposite. In that case the San Francisco school system neglected to provide English language instruction to about 1800 students of Chinese ancestry. The court held that this violated a specific statute (42 U.S.C. § 2000d) and guidelines of the Department of Health, Education and Welfare in connection with furnishing federal financial assistance to public school systems. The court stated that it did not reach the Equal Protection Clause argument but relied solely on the statute and guidelines.

Frontera did not have a constitutional right to public employment. His poor showing in the examination, ranking 103rd out of 127 applicants who took the test, would hardly justify any court in substituting him for the person who received the highest grade.

In conducting the examination in English the Commission violated no constitutional or civil right of Frontera. In our opinion the test was job related. *Griggs* v. *Duke Power Co.*, 401 U.S., 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971).

Affirmed.

PHILLIPS, Chief Judge (concurring in the result).

I concur in the result reached by the majority opinion:

1) That no constitutional rights of Damian Frontera, or the Spanish-speaking class he represents, were violated by the failure of defendants to give Frontera an examination in Spanish, or to provide pre-examination announcements, literature and instructions in the Spanish language, under the facts and circumstances of this case;

2) That appellants have not established a right of action under 42 U.S.C. §§ 1981, 1983 or 1985; and

3) That the judgment of the District Court dismissing the complaint should be affirmed.

NOTES

1. These skilled crafts included that of carpenter, painter, steamfitter, steamfitter-welder, bricklayer, cement finisher, electrician, iron-worker, plumber, roofer and plasterer.

2. The evidence is clear that the Commission does not intentionally discriminate against Spanish language persons. Consequently, the effect of English language announcements and testing is better described as having a "disproportionate impact" to eliminate the pejorative connotations of the word "discriminatory." *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 391 n. 4 (2nd Cir. 1973); *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972).

The Commission does not have any policy against conducting examinations in Spanish. In fact, in the 1970 patrolmen's examination announcements, introductions, and other material were furnished in Spanish to those who desired them.

3. See, e.g. 42 U.S.C. § 1973b(e), and 42 U.S.C. § 2000d as interpreted by 45 C.F.R. § 80.3(b)(1). The Supreme Court dealt with the former provision in *Katzenbach* v. *Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), and the latter provision in *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

Hector GARCIA, etc., Plaintiff-Appellant,
v.
Alton V.W. GLOOR et al.,
Defendants-Appellees.
No. 77-2358.

United States Court of Appeals,
Fifth Circuit.
May 22, 1980.

James A. Herrmann, Texas Rural Legal Aid, Inc., Harlingen, Tex., for plaintiff-appellant.

Ruben Rendon, Mexican American Legal Defense and Educational Fund, San Francisco, Cal., for Mexican American Legal Defense and Educational Fund, amicus curiae.

Joel G. Contreras, Vilma S. Martinez, San Francisco, Cal., William H. Ng, Washington, D.C., for Equal Employment Opportunity Commission, amicus curiae.

Edna E. Canino, Miami, Fla., for amicus—League of United Latin American Citizens.

Joan Humphrey Lefkow, Coral Gables, O.C. Hamilton, Neil E. Norquest, McAllen, Tex., for defendants-appellees.

Jerry Nugent, Austin, Tex., for Lumberman's Ass'n of Texas, amicus curiae.

Appeal from the United States District Court for the Southern District of Texas.

Before FAY, RUBIN and HATCHETT, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

IT IS ORDERED that this court's opinion reported at 609 F.2d 156 (5th Cir. 1980) be withdrawn and the following is substituted:

Invoking Title VII, the Equal Employment Opportunity Act, 42 U.S.C. § 2000e-2 [EEO Act], Hector Garcia, a native-born American of Mexican descent, challenges as discriminatory his employer's rule that prohibits employees engaged in sales work from speaking Spanish on the job. Because the group of employees Mr. Garcia sought to represent was not numerous enough to constitute a class, we affirm the trial court's denial of class action certification. We conclude that the "speak-only-English" rule, as it was applied to Mr. Garcia by his employer, does not discriminate on the basis of national origin. We therefore affirm the district court's judgment that Mr. Garcia's discharge for violating the rule was not unlawful.

I

Hector Garcia, who was twenty-four years of age at the time of trial, completed the first semester of the tenth grade in Texas public schools. He speaks both English and Spanish. His grandparents were immigrants from Mexico; he is native-born, but he has always spoken Spanish in his own household.

In 1975, he was employed as a salesman by Gloor Lumber and Supply, Inc., in Brownsville, Texas. His duties included stocking his department and keeping it in order, assisting other department salespersons and selling lumber, hardware and supplies. He had received compliments from management on his work and in May 1975 had received a bonus of $250. However, there also was evidence that Mr. Garcia was not a satisfactory employee, that management's compliments were bestowed as incentives to better performance when, on occasion, his work showed some improvement and that a bonus was awarded to all employees at year-end without regard to merit.

Gloor had a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers. Most of Gloor's employees were bilingual, but some who worked outside in the lumber yard did not speak English. The rule did not apply to those employees. It also did not apply to conversation during work breaks.

Mr. Garcia testified that, because Spanish is his primary language, he found the English-only rule difficult to follow. He testified that on June 10, 1975 he was asked a question by another Mexican-American employee about an item requested by a customer and he responded in Spanish that the article was not available. Alton Gloor, an officer and stockholder of Gloor, overheard the conversation. Thereafter Mr. Garcia was discharged.

Mr. Gloor testified, and the district court found as a fact, that Mr. Garcia's discharge was for a combination of deficiencies—failure to keep his inventory current, failure to replenish the stock on display from stored merchandise, failure to keep his area clean and failure to respond to numerous reprimands—as well as for violation of the English-only rule. The court also found that the English-only policy was not strictly enforced but that Mr. Garcia had violated it "at every opportunity since the time of his hiring according to his own testimony."

In addition to offering this evidence to justify firing Mr. Garcia, Mr. Gloor testified that there were business reasons for the language policy: English-speaking customers objected to communications between employees that they could not understand; pamphlets and trade literature were in English and were not available in Spanish, so it was important for employees to be fluent in English apart from conversations with English-speaking customers; if employees who normally spoke Spanish off the job were required to speak English on the job at all times and not only when waiting on English-speaking customers, they would improve their English; and the rule would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates. The district court found that these were valid business reasons and that they, rather than discrimination, were the motive for the rule.

An expert witness called by the plaintiff testified that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others. Consequently, Mr. Garcia contends, with support from the Equal Employment Opportunity Commission [EEOC], that the rule violates the EEO Act and the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1985(c).

Of the eight salesmen employed by Gloor in 1975, seven were Hispanic, a matter perhaps of business necessity, because 75% of the population in its business area is of Hispanic background and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish. Of its 39 employees, 31 were Hispanic, and a Hispanic sat on the Board of Directors. There is no contention that Gloor discriminated against Hispanic-Americans in any other way.

The narrow issue is whether the English-only rule as applied to Mr. Garcia imposed a discriminatory condition of employment.

II

Mr. Garcia properly complains that the court arrived at its denial of class certification by deciding that he had no case on the merits. The question of class certification is a procedural one, distinct from the merits of the action. *Huff* v. *N.D. Cass Co.*, 5 Cir. 1973 (en banc), 485 F.2d 710; *Miller* v. *Mackey International, Inc.*, 5 Cir. 1971, 452 F.2d 424, 427-28. Whether a class should be certified depends entirely on whether the proposal satisfies the requirements of Fed.R.Civ.P. 23. See generally 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 1759-1770 (1972).

However, the result reached by the trial judge was correct. A prerequisite for a class action is that the class be "so numerous that joinder of all members is impracticable." Fed.R. Civ.P. 23(a)(1). "The raison d'etre of the class suit doctrine is necessity, which in turn depends upon the question of number." 3B Moore's Federal Practice ¶ 23.05, at 23-149 (2d ed. 1979). This depends on the facts of each case and no arbitrary rules have been established, 7 C. Wright and A. Miller, Federal Practice and Procedure: Civil, § 1762 (1972), nor indeed should be. The basic question is practicability of joinder, not number of interested persons per se. Practicability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion. See id.; 3B Moore's Federal Practice ¶ 23.05 (2d ed. 1979).

Only thirty-one persons, those Gloor employees who were Hispanic, were affected by the English-only rule. Their identity and addresses were readily ascertainable, and they all lived in a compact geographical area. The suggested class therefore failed to meet the elementary requirement that supports the whole theory of class actions—representation by one person of a group so numerous that joinder in one suit would be impracticable.

III

Although the trial judge concluded that Mr. Garcia was fired for a number of reasons, including deliberately speaking Spanish on the job in purposeful violation of Gloor's rule, the judge made no finding concerning the substantiality of the language violation in contributing to the matrix of motive. Perhaps under the evidence he could not, once the omelet had been cooked, determine what each egg had contributed to it.

Employer action does not violate Title VII merely because a reprobated reason plays some part in the employer's decision, see *Rogers* v. *Equal Employment Opportunity Commission*, D.C.Cir. 1977, 551 F.2d 456; yet the forbidden taint need not be the sole basis for the action in order to condemn it. The record would support a finding that Mr. Garcia's use of Spanish was a significant factor and, therefore, rather than remand for a determination by the trial court, we will assume for present purposes that it was. We turn then to the issue that appears to both parties and the several amici to be at the core of the case.

The EEO Act sought to assure equality of employment opportunity by making it unlawful for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

In interpreting the statute[1] we start with its plain words without pausing to consider whether a statute differently framed would yield results more consonant with fairness and reason. See B. Cardozo, The Nature of the Judicial Process 88-89 (1921). The first consideration is the problem, not the answer. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 529-30 (1947). The statute forbids discrimination in employment on the basis of national origin. Neither the statute nor common understanding equates national origin with the language that one chooses to speak.[2] Language may be used as a covert basis for national origin discrimination, but the English-only rule was not applied to Garcia by Gloor either to this end or with this result.

Mr. Garcia argues that it is discriminatory to prohibit employees from speaking a foreign language on the basis of a thesis that, if an employee whose most familiar language is not English is denied the right to converse in that language, he is denied a privilege of employment enjoyed by employees most comfortable in English; that, necessarily, discriminates against him on the basis of national origin because national origin influences or determines his language preference. Whether or not this argument might have a tenable basis if made on behalf of all employees who are bilingual or if invoked against a rule that forbade all use of any language but English we need not consider. Mr. Garcia was fully bilingual. He chose deliberately to speak Spanish instead of English while actually at work. He was permitted to speak the language he preferred during work breaks.

No authority cited to us gives a person a right to speak any particular language while at work; unless imposed by statute, the rules of the workplace are made by collective bargaining or, in its absence, by the employer. An employer's failure to forbid employees to speak English does not grant them a privilege. The refusal to hire applicants who cannot speak English might be discriminatory if the jobs they seek can be performed without knowledge of that language, but the obverse is not correct: if the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference. Mr. Garcia was bilingual. Off the job, when he spoke one language or another, he exercised a preference. He was hired by Gloor precisely because he was bilingual, and, apart from the contested rule, his preference in language was restricted to some extent by the nature of his employment. On the job, in addressing English-speaking customers, he was obliged to use English; in serving Spanish-speaking patrons, he was required to speak Spanish. The English-only rule went a step further and restricted his preference while he was on the job and not serving a customer.

Let us assume that, as contended by Mr. Garcia, there was no genuine business need for the rule and that its adoption by Gloor was arbitrary. The EEO Act does not prohibit all arbitrary employment practices. It does not forbid employers to hire only persons born under a certain sign of the zodiac or persons having long hair or short hair or no hair at all.[3] It is directed only at specific impermissible bases of discrimination—race, color, religion, sex, or national origin.[4] National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage, *Espinoza* v. *Farah Manufacturing Co.*, 1973, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287, or poverty, *Ybarra* v. *City of Los Altos Hills*, 9 Cir. 1974, 503 F.2d 250, 253, or with activities not connected with national origin, such as labor agitation, *Balderas* v. *La Casita Farms, Inc.*, 5 Cir. 1974, 500 F.2d 195, 198.

Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter, see *Willingham* v. *Macon Telegraph Publishing Co.*, 5 Cir. 1975, (en banc), 507 F.2d 1084 (employer's grooming code that required different hair lengths for males and females held not to constitute sex discrimination),[5] or that impose a burden on an employee on one of the prohibited bases. No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics. As this court said in *Willingham*, "Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity." 507 F.2d at 1091 (emphasis in original).[6]

The argument is made that the rule is discriminatory in impact, even if that result was not intentional, because it was likely to be violated only by Hispanic-Americans and that, therefore, they have a higher risk of incurring penalties. The disparate impact test has been applied to hiring criteria, *Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and to on-the-job policies, *Nashville Gas Co.* v. *Satty*, 1977, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356. It forbids the use of any employment criterion, even one neutral on its face and not intended to be discriminatory, if, in fact, the criterion causes discrimination as measured by the impact on a person or group entitled to equal opportunity. However, there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference. Mr. Garcia could readily comply with the speak-English-only rule; as to him nonobservance was a matter of choice. In similar fashion, an employer might, without business necessity, adopt a rule forbidding smoking on the job. The Act would not condemn that rule merely because it is shown that most of the employees of one race smoke, most of the employees of another do not and it is more likely that a member of the race more addicted to tobacco would be disciplined.

We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification. Differences in language and other cultural attributes may not be used as a fulcrum for discrimination. However, the English only rule, as applied by Gloor to Mr. Garcia, did not forbid cultural expression to persons for whom compliance with it might impose hardship. While Title VII forbids the imposition of burdensome terms and conditions of employment as well as those that produce an atmosphere of racial and ethnic oppression, see *Rogers* v. *Equal Employment Opportunity Commission*, 5 Cir. 1971, 454 F.2d 234, 238-39, *cert. denied*, 1972, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343, the evidence does not support a finding that the English only rule had this effect on Mr. Garcia.

The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin. To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. No claim is made that Garcia and the other employees engaged in sales were unable to speak English. Indeed, it is conceded that all could do so and that this ability was an occupational qualification because of the requirement that they wait on customers who spoke only English or who used the language by choice. Nor are we confronted with a case where an employee inadvertently slipped into using a more familiar tongue.

The rule was confined to the work place and work hours. It did not apply to conversations during breaks or other employee free-time. There is no evidence that Gloor forbade speaking Spanish to discriminate in employment or that the effect of doing so was invidious to Hispanic Americans. We do not consider rules that turn on the language used in an employee's home, the one he chooses to speak when not at work or the tongue spoken by his parents or grandparents. In some circumstances, the ability to speak or the speaking of a language other than English might be equated with national origin, but this case concerns only a requirement that persons capable of speaking English do so while on duty.

That this rule prevents some employees, like Mr. Garcia, from exercising a preference to converse in Spanish does not convert it into discrimination based on national origin. Reduced to its simplest, the claim is "others like to speak English on the job and do so without penalty. Speaking Spanish is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden." The argument thus reduces itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even one closely related to self-identity.

Mr. Garcia and the EEOC would have us adopt a standard that the employer's business needs must be accomplished in the manner that appears to us to be the least restrictive. The statute does not give the judiciary such latitude in the absence of discrimination. Judges, who have neither business experience nor the problem of meeting the employees' payroll, do not have the power to preempt an employer's business judgment by imposing a solution that appears less restrictive. See *Furnco Construction Corp.* v. *Waters,* 1978, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957.

IV

Having reached this point, it is unnecessary for us to consider the claims asserted under 42 U.S.C. § 1981 and 42 U.S.C. § 1985(c). Section 1981, which originated in the Civil Rights Act of 1866, assures "all persons" the same rights "enjoyed by white citizens" in making and enforcing contracts and in exercising other described rights. "Section 1981 is a parallel remedy against discrimination which may derive its legal principles from Title VII." *Blum* v. *Gulf Oil Corp.,* 5 Cir. 1979, 597 F.2d 936, 938. See *Johnson* v. *Alexander,* 8 Cir. 1978, 572 F.2d 1219, 1223 and n. 3, cert. denied, 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658. The facts here that preclude relief under Title VII also preclude a Section 1981 claim. See *Blum* v. *Gulf Oil Corp.,* 5 Cir. 1979, 597 F.2d 936, 938.[7]

Section 1985(c), which originated with the Civil Rights Act of 1871, gives a cause of action for damages to any person who is a victim of a conspiracy to deprive that person or a class of persons of equal protection of the laws or of equal privileges and immunities under the laws. Although the statute reaches purely private conspiracies, *Griffin* v. *Breckenridge*, 1971, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, because Mr. Garcia's claim rests on a violation of Title VII he may not invoke Section 1985(c). *Great American Federal Savings & Loan Association* v. *Novotny*, 1979, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957.[4] Cf. *Johnson* v. *Railway Express Agency, Inc.*, 1975, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 2d 295 (aggrieved employee not limited to Title VII but may also sue for employment discrimination under Section 1981).

V

Some of Mr. Garcia's evidence was excluded by the trial judge: the investigative reports and determinations of the EEOC and the transcript of proceedings concerning Mr. Garcia's unemployment compensation claim conducted by the Texas Employment Commissioner's (TEC) Appeals Tribunal. If the exclusion of these was error, it was harmless, for, after weighing the evidence actually admitted, neither would have added appreciable weight to the contention that the rule was discriminatory. Fed. R.Evid. 103(a).

Most of the battle about the additional evidence appears to have been fought on the question of whether they were or were not business records. The admissibility of such official documents under the Federal Rules of Evidence is not determined by business records rules standards but by Rule 803(8), which provides for the admission of reports of public agencies.

The district judge was, indeed, in error in refusing to admit the investigative report and determinations of the EEOC. See *Peters* v. *Jefferson Chemical Co.*, 5 Cir. 1975, 516 F.2d 447, 450; *Smith* v. *Universal Services, Inc.*, 5 Cir. 1972, 454 F.2d 154, 157-58. That error was, as we have said, harmless. The rule would permit the introduction of the transcript of the TEC proceedings, which was transcribed by the secretary of Mr. Garcia's lawyer, only if it were properly authenticated. Fed.R.Evid. 901. The court's rejection of the unauthenticated transcript of the TEC hearing as independent evidence was proper.

VI

Our opinion does not impress a judicial imprimatur on all employment rules that require an employee to use or forbid him from using a language spoken by him at home or by his forebears. We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule. Even if we assume that the violation of the rule was a substantial factor leading to Mr. Garcia's discharge, we, therefore, affirm the district court's judgment that Mr. Garcia was neither discharged because of his national origin nor denied equal conditions of employment based on that factor; instead, he was discharged because, having the ability to comply with his employer's rule, he did not do so.

The judgment is AFFIRMED.

HATCHETT, Circuit Judge, concurs in the result.

NOTES

1. While the EEOC has considered in specific instances whether a policy prohibiting the speaking of Spanish in normal interoffice contacts discriminates on the basis of national origin, [1972] Empl.Prac. Guide (CCH) ¶ 6293; [1972] Empl.Prac. Guide (CCH) ¶ 6173, it has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.

2. The statute's legislative history concerning the meaning of "national origin" is "quite meager." See *Espinoza* v. *Farah Mfg. Co.*, 1973, 414 U.S. 86, 88, 94 S.Ct. 334, 337, 38 L.Ed.2d 287, 291.

3. Cf. *NLRB* v. *Knuth Brothers, Inc.*, 7 Cir. 1976, 537 F.2d 950, 954 (employer may discharge employee for no reason at all so long as the motivation is not violative of the National Labor Relations Act).

4. See generally Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109 (1971).

5. Courts also have found discrimination in situations in which, although the basis of discrimination was not strictly immutable, a fundamental right was thought to be involved. *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d at 1091. See *Phillips* v. *Martin Marietta Corp.*, 1971, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (employment discrimination against women with pre-school age children); *Sprogis* v. *United Air Lines, Inc.*, 7 Cir. 1971, 444 F.2d 1194 cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (rule prohibiting female stewardesses but not male stewards from getting married found discriminatory). Cf. *General Electric Co.* v. *Gilbert*, 1976, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (exclusion of pregnancy from disability benefits plan held not to be sex discrimination).

6. Some taxonomies, while ostensibly based on mutable characteristics, may be merely disguised discrimination either in intent or effect. Thus, employing only persons who have a high school degree when the job can adequately be performed by persons of lesser education can be concealed discrimination against racial groups whose numbers include fewer high school graduates. See *Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. We need not here explore the extent to which the EEO Act forbids discrimination based on characteristics that are not immutable. For the purposes of this opinion, we accept the thesis that there may be a disparate impact based on some mutable conditions, such as where an employee lives. Religion is, of course, a forbidden criterion, even though a matter of individual choice.

7. We need not, therefore, now decide whether the provision in Section 1981 that "all persons" shall have those described rights and benefits accorded "white citizens" protects those who are denied these rights because they are Hispanic-Americans. See *Manzanares* v. *Safeway Stores, Inc.*, 10 Cir. 1979, 593 F.2d 968; cf. *Guerra* v. *Manchester Terminal Corp.*, 5 Cir. 1974, 498 F.2d 641, 653-54 (Section 1981 applies to aliens).

8. We do not reach the question whether Section 1985(c) was intended to cover only racial bias. See *McLellan* v. *Mississippi Power & Light Co.*, 5 Cir. 1977, (en banc), 545 F.2d 919; Comment, A Construction of Section 1985(c) in Light of its Original Purpose, 46 U.Chi.L.Rev. 402 (1979).

Curtailments on Use of Foreign Language Effect National Origin Bias

Decision of Equal Employment Opportunity Commission,
Decision No. 71-446, November 5, 1970.

EXTRACT FROM DECISION

The Commission makes the following additional Findings of Fact.

During the course of the investigation, it was revealed that Respondent's foreman and lead girl restricted Respondent's Spanish surnamed American employees from speaking Spanish on the premises, both at their work stations and during lunch and other non-working times.

The foreman and lead girl state they imposed the aforementioned restriction because the lead girls understand no Spanish.

Respondent advances no claim of business necessity for its rule. For the following reasons, we find that Respondent discriminates against its Spanish surnamed American employees with respect to their terms, conditions, or privileges of employment because of their national origin in violation of Section 703(a) (1) of Title VII.

It is now well settled that conversation, including social conversation, at work both during working and non-working time, is a term or condition of employment within the meaning of Section 8(a), 8(d), and 9(a) of the National Labor Relations Act.[1] It also is clear that "terms, conditions, or privileges of employment" as used in Title VII has a scope no less wide—it is in our view wider—than "term or condition of employment" as used in the National Labor Relations Act. Here the employees were speaking in a tongue which was, for all or some of them, their native tongue and/or the tongue in which they spoke familiarly and/or the tongue in which they were most comfortable. It follows, and we hold, that it is a term, condition, or privilege of employment for Spanish surnamed Americans to speak Spanish at work.

So far as appears from the record, Respondent's rule against speaking Spanish was announced only to Respondent's Spanish surnamed American employees. There is accordingly substantial evidence that the rule was directed solely against Respondent's Spanish surnamed American employees. To the extent that the rule was directed solely against those employees, it denied them as a class a term, condition, or privilege of employment enjoyed by other employees and was in clear violation of Title VII. This would be so whether the rule were treated as it was announced, a rule against speaking Spanish or—treated more charitably for Respondent—as a specific application of a rule against speaking languages not understood by Respondent's supervision.

Putting the rule in the posture most charitable towards Respondent, we treat the rule as one whose content is a prohibition against speaking any language not understood by Respondent's supervision and whose direction is against *all* employees. In this posture, the rule acquires the appearance of universality and neutrality. We conclude, however, that even in this posture, the rule violates Title VII. It is now well settled that the intentional, by which is meant non-accidental, use of a policy which in fact discriminates between classes protected by Title VII and other classes is prohibited by Title VII and the Commission's National Origin Guidelines, unless a business necessity is shown for the policy.[2] Here the rule, whatever its statement, has the obvious and clear effect of denying Respondent's Spanish surnamed American employees (as well as other minority groups, if any there be, who converse in some language other than English) a term, condition, or privilege of employment enjoyed by other employees: to converse in a familiar language with which they are most comfortable.

Second, there is no allegation or evidence of business necessity for the rule. Especially is this clear from the fact that the rule relates to the employees' non-working as well as their working time. There may be occasions when business necessity will permit an employer to forbid employees at their work stations during working time from speaking languages not understood by the employee's supervisors. It is, however, difficult if not impossible, to conceive of an occasion when business necessity permits a ban on the use of such languages during non-working time.[3]

DECISION

There is reasonable cause to believe that Respondent committed an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by promulgating a rule restricting Respondent's Spanish surnamed American employees from speaking Spanish on Respondent's premises.

NOTES

1. 29 U.S.C. 158(a)(3), 158(d), 159(a). See, for example, *Staub Cleaners, Inc.*, [1964 CCH NLRB ¶ 13,341] 148 NLRB 278, 279, 285, 286, enfd. in relevant part, [53 LC ¶ 11,097] 357 F.2d 1 (C.A. 2, 1966) (chatting); *Dal-Tex Optical Company, Inc.*, [1965 CCH NLRB ¶ 9398] 152 NLRB 1317, 1333; enfd., per curiam [55 LC ¶ 11,980] 378 F.2d 443 (C.A. 5, 1967) (conversation); *Wald Manufacturing Company*, [1969 CCH NLRB ¶ 20,958] 176 NLRB No. 119, slip opinion at p. 15, enfd., [63 LC ¶ 10,930]—F.2d—(C.A. 6, June 3, 1970), 74 LRRM 2375 (whistling); *North American Aviation, Inc.*, [1967 CCH NLRB ¶ 2229] 163 NLRB 863, enfd. as modified, [57 LC ¶ 12,498] 389 F.2d 866 (C.A. 10, 1968) (use of telephone for outside phone calls).

2. *Gregory* v. *Litton Systems, Inc.*, [2 EPD ¶ 10,264, 63 LC ¶ 9485] 316 F. Supp. 82 (C.D. Cal., July 28, 1970) and cases cited therein; *NLRB* v. *Great Dane Trailers Inc.*, [55 LC ¶ 11,973] 388 U.S. 26, 34 (1967); *Local 53, Asbestos Workers* v. *Vogler*, [1 EPD ¶ 9952, 59 LC ¶ 9195] 407 F.2d 1047, 1054, (C.A. 5, 1969); 29 C.F.R. 1606.

3. See *Republic Aluminum Company* v. *NLRB*, [57 LC ¶ 12,633] 394 F.2d 405 (C.A. 5, 1968) and cases therein cited on the long established distinction between working time and non-working time with respect to employer prohibitions against the solicitations of employees to join labor organizations.

We note an opinion of the Attorney General of the State of New Mexico, No. 60-99, 1959-60 [¶ 25,807.01], that a rule requiring employees to speak only English during working hours constitutes an unlawful employment practice under the State's Human Rights Act. We agree with the Attorney General's reasoning.

Educational Access

Kinney Kinmon LAU, a minor by and through
Mrs. Kam Wai Lau, his guardian ad litem, et al., Petitioners,
v.
Alan H. NICHOLS et al.
No. 72-6520.

Argued Dec. 10, 1973.
Decided Jan. 21, 1974.

Edward H. Steinman, Santa Clara, Cal., for petitioners; Kenneth Hecht and David C. Moon, San Francisco, Cal., on the briefs.

Thomas M. O'Connor, San Francisco, Cal., for respondents; George E. Krueger and Burk E. Delventhal, San Francisco, Cal., on the brief.

J. Stanley Pottinger, Asst. Atty. Gen., San Francisco, Cal., for the United States, as amicus curiae, by special leave of Court; Solicitor Gen., Robert Bork, Deputy Solicitor Gen., Lawrence G. Wallace, Mark L. Evans and Brian K. Landsberg, Washington, D.C., on the brief.

Stephen J. Pollak, Ralph J. Moore, Jr., David Rubin, Washington, D.C., and Peter T. Galiano, Burlingame, Cal., for Nat. Ed. Assn. and others; W. Reece Bader and James R. Madison, San Francisco, Cal., for San Francisco Lawyers' Committee for Urban Affairs; J. Harold Flannery, Washington, D.C., for Center for Law and Ed., Harvard University; Herbert Teitelbaum, New York City, for Puerto Rican Legal Defense and Ed. Fund, Inc.; Mario G. Obledo, San Francisco, Cal., Sanford J. Rosen, Berkeley, Cal., Michael Mendelson, and Alan Exelrod, San Francisco, Cal., for Mexican American Legal Defense and Educational Fund and others; Samuel Rabinove, Joseph B. Robison, Arnold Forster, and Elliot C. Rothenberg, New York City, for American Jewish Committee and others; F. Raymond Marks, Berkeley, Cal., for the Childhood and Government Project; Martin Glick, San Francisco, Cal., for Efrain Tostado and others; and the Chinese Consolidated Benevolent Assn. and others, as amicus curiae.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The San Francisco, California, school system was integrated in 1971 as a result of a federal court decree, 339 F.Supp. 1315. See *Lee* v. *Johnson,* 404 U.S. 1215, 92 S.Ct. 14, 30 L.Ed. 2d 19. The District Court found that there are 2,856 students of Chinese ancestry in the school system who do not speak English. Of those who have that language deficiency, about 1,000 are given supplemental courses in the English language.[1] About 1,800 however, do not receive that instruction.

This class suit brought by non-English-speaking Chinese students against officials responsible for the operation of the San Francisco Unified School District seeks relief against the unequal educational opportunities, which are alleged to violate, *inter alia,* the Fourteenth

Amendment. No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

The District Court denied relief. The Court of Appeals affirmed, holding that there was no violation of the Equal Protection Clause of the Fourteenth Amendment or of § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, which excludes from participation in federal financial assistance, recipients of aid which discriminate against racial groups, 483 F.2d 791. One judge dissented. A hearing en banc was denied, two judges dissenting, Id, at 805.

We granted the petition for certiorari because of the public importance of the question presented, 412 U.S. 938, 93 S.Ct. 2786, 37 L.Ed.2d 397.

The Court of Appeals reasoned that "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system," 483 F.2d, at 797. Yet in our view the case may not be so easily decided. This is a public school system of California and § 71 of the California Education Code states that "English shall be the basic language of instruction in all schools." That section permits a school district to determine "when and under what circumstances instruction may be given bilingually." That section also states as "the policy of the state" to insure "the mastery of English by all pupils in the schools." And bilingual instruction is authorized "to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language."

Moreover, § 8573 of the Education Code provides that no pupil shall receive a diploma of graduation from grade 12 who has not met the standards of proficiency in "English," as well as other prescribed subjects. Moreover, by § 12101 of the Education Code (Supp. 1973) children between the ages of six and 16 years are (with exceptions not material here) "subject to compulsory full-time education."

Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to reverse the Court of Appeals.

That section bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." The school district involved in this litigation receives large amounts of federal financial assistance. The Department of Health, Education, and Welfare (HEW), which has authority to promulgate regulations prohibiting discrimination in federally assisted school systems, 42 U.S.C. § 2000d—1, in 1968 issued one guideline that "[s]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system." 33 Fed.Reg. 4955. In 1970 HEW made the guidelines more specific, requiring school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to students who had "linguistic deficiencies," 35 Fed.Reg. 11595.

By § 602 of the Act HEW is authorized to issue rules, regulations, and orders[2] to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with § 601. HEW's regulations, 45 CFR § 80.3(b)(1), specify that the recipients may not

> "(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> . . . . . .
>
> "(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program."

Discrimination among students on account of race or national origin that is prohibited includes "discrimination . . . in the availability or use of any academic . . . or other facilities of the grantee or other recipient." Id., § 80.5(b).

Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." Id., § 80.3(b)(2).

It seems obvious that the Chinese-speaking minority receive fewer benefits that the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations.[3] In 1970 HEW issued clarifying guidelines, 35 Fed.Reg. 11595, which include the following:

> "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."
>
> "Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track."

Respondent school district contractually agreed to "comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation" of HEW (45 CFR pt. 80) which are "issued pursuant to that title . . ." and also immediately to "take any measures necessary to effectuate this agreement." The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127, 142-143, 67 S.Ct. 544, 552-554, 91 L.Ed. 794. Whatever may be the limits of that power, *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 590, 57 S.Ct. 883, 892, 81 L.Ed. 1279 et seq., they have not been reached here. Senator Humphrey, during the floor debates on the Civil Rights Act of 1964, said:[4]

> "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

We accordingly reverse the judgment of the Court of Appeals and remand the case for the fashioning of appropriate relief.

Reversed and remanded.

Mr. Justice WHITE concurs in the result.

Mr. Justice STEWART, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, concurring in the result.

It is uncontested that more than 2,800 schoolchildren of Chinese ancestry attend school in the San Francisco Unified School District system even though they do not speak, understand, read, or write the English language, and that as to some 1,800 of these pupils the respondent school authorities have taken no significant steps to deal with this language deficiency. The petitioners do not contend, however, that the respondents have affirmatively or intentionally contributed to this inadequacy, but only that they have failed to act in the face of changing social and linguistic patterns. Because of this laissez-faire attitude on the part of the school administrators, it is not entirely clear that § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, standing alone, would render illegal the expenditure of federal funds on these schools. For that section provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

On the other hand, the interpretive guidelines published by the Office for Civil Rights of the Department of Health, Education, and Welfare in 1970, 35 Fed.Reg. 11595, clearly indicate that affirmative efforts to give special training for non-English-speaking pupils are required by Tit. VI as a condition to receipt of federal aid to public schools:

> "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[1]

The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601.[2] Last Term, in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed.2d 318, we held that the validity of a regulation promulgated under a general authorization provision such as § 602 of Tit. VI[3] "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280–281, 89 S.Ct. 518, 525, 21 L.Ed.2d 474 (1969)." I think the guidelines here fairly meet that test. Moreover, in assessing the purposes of remedial legislation we have found that departmental regulations and "consistent administrative construction" are "entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434, 91 S.Ct. 849, 854–855, 28 L.Ed.2d 158; *Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616. The Department has reasonably and consistently interpreted § 601 to require affirmative remedial efforts to give special attention to linguistically deprived children.

For these reasons I concur in the result reached by the Court.

Mr. Justice BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the result.

I join Mr. Justice Stewart's opinion and thus I, too, concur in the result. Against the possibility that the Court's judgment may be interpreted too broadly, I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom. We may only guess as to why they have had no exposure to English in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience.

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

NOTES

Opinion of the Court

1. A report adopted by the Human Rights Commission of San Francisco and submitted to the Court by respondents after oral argument shows that, as of April 1973, there were 3,457 Chinese students in the school system who spoke little or no English. The document further showed 2,136 students enrolled in Chinese special instruction classes, but at least 429 of the enrollees were not Chinese but were included for ethnic balance. Thus, as of April 1973, no more than 1,707 of the 3,457 Chinese students needing special English instruction were receiving it.

2. Section 602 provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ." 42 U.S.C. § 2000d-1.

3. And see Report of the Human Rights Commission of San Francisco, Bilingual Education in the San Francisco Public Schools, Aug. 9, 1973.

4. 110 Cong.Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

Stewart

1. These guidelines were issued in further clarification of the Department's position as stated in its regulations issued to implement Tit. VI, 45 CFR pt. 80. The regulations provide in part that no recipient of federal financial assistance administered by HEW may

"Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; [or]

"Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program." 45 CFR § 80.3(b) (1)(ii), (iv).

2. The respondents do not contest the standing of the petitioners to sue as beneficiaries of the federal funding contract between the Department of Health, Education, and Welfare and the San Francisco Unified School District.

3. Section 602, 42 U.S.C. § 2000d-1, provides in pertinent part:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ."

The United States as amicus curiae asserts in its brief, and the respondents appear to concede, that the guidelines were issued pursuant to § 602.

Judy SERNA, a minor through her parent and general guardian, Romana Serna, et al., Plaintiffs-Appellees,

v.

PORTALES MUNICIPAL SCHOOLS

et al., Defendants-Appellants.

No. 73-1737.

United States Court of Appeals,
Tenth Circuit.

Argued March 20, 1974.
Decided July 17, 1974.

Charles A. Pharris, Albuquerque, N.M., for defendants-appellants.

Vilma S. Martinez, San Francisco, Cal. (Sanford Jay Rosen, Alan B. Exelrod, and Michael A. Mendelson, San Francisco, Cal., David W. Bonem, Clovis, N.M., Dan Sosa, Jr., Las Cruces, N.M., on the brief), for plaintiffs-appellees.

C. Emery Cuddy, Jr., Santa Fe, N.M., for amicus curiae State Bd. of Ed.

Before HILL and McWILLIAMS, Circuit Judges, and DURFEE,* Judge.

HILL, Circuit Judge.

Appellees in this class action are Spanish surnamed Americans seeking declaratory and injunctive relief against Portales Municipal School District for alleged constitutional and statutory violations committed under color of state law. In particular, appellees contend that appellant-school district has deprived them of their right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and of their statutory rights under Title VI of the 1964 Civil Rights Act, specifically § 601, 42 U.S.C. § 2000d. Jurisdiction is invoked under 28 U.S.C. § 1343.

Pertinent facts include the following. The City of Portales, New Mexico, has a substantial number of Spanish surnamed residents. Accordingly, a sizable minority of students attending the Portales schools are Spanish surnamed. Evidence indicates that many of these students know very little English when they enter the school system. They speak Spanish at home and grow up in a Spanish culture totally alien to the environment thrust upon them in the Portales school system. The result is a lower achievement level than their Anglo-American counterparts, and a higher percentage of school dropouts.

For the 1971-72 school year approximately 34 percent of the children attending Portales' four elementary schools, Lindsey, James, Steiner and Brown, were Spanish surnamed.[1] The junior high school and senior high school enrollments of Spanish surnamed students were 29 percent and 17 percent, respectively. Unquestionably as Spanish surnamed children advanced to the higher grades a dis-

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proportionate number of them quit school.

Appellees in their complaint charge appellant with discriminating against Spanish surnamed students in numerous respects. Allegedly there is discrimination in appellants' failure to provide bilingual instruction which takes into account the special educational needs of the Mexican-American student; failure to hire any teachers of Mexican-American descent; failure to structure a curriculum that takes into account the particular education needs of Mexican-American children; failure to structure a curriculum that reflects the historical contributions of people of Mexican and Spanish descent to the State of New Mexico and the United States; and failure to hire and employ any administrators including superintendents, assistant superintendents, principals, vice-principals, and truant officers of Mexican-American descent. This failure to provide equal educational opportunities allegedly deprived appellees and all other similarly situated of their right to equal protection of the laws under the Fourteenth Amendment.

At trial appellees presented the following evidence to support their allegations. Until 1970 none of the teachers in the Portales schools was Spanish surnamed, including those teaching the Spanish language in junior and senior high school; there had never been a Spanish surnamed principal or vice-principal and there were no secretaries who spoke Spanish in the elementary grades.

Evidence was offered showing that in 1969 the report by Portales Municipal Schools to United States Commission on Civil Rights indicated that at Lindsey, the 86 percent Spanish surnamed school, only four students with Spanish surnames in the first grade spoke English as well as the average Anglo first grader. During an evaluation of the Portales Municipal Schools by the New Mexico Department of Education in 1969, the evaluation team concluded that the language arts program at Lindsey School "was below average and not meeting the needs of those children." Notwithstanding this knowledge of the plight of Spanish surnamed students in Portales, appellants neither applied for funds under the federal Bilingual Education Act, 20 U.S.C. § 880b, nor accepted funds for a similar purpose when they were offered by the State of New Mexico.

Undisputed evidence shows that Spanish surnamed students do not reach the achievement levels attained by their Anglo counterparts. For example, achievement tests, which are given totally in the English language, disclose that students at Lindsey are almost a full grade behind children attending other schools in reading, language mechanics and language expression. Intelligence quotient tests show that Lindsey students fall further behind as they move from the first to the fifth grade. As the disparity in achievement levels increases between Spanish surnamed and Anglo students, so does the disparity in attendance and school dropout rates.

Expert witnesses explained what effect the Portales school system had on Spanish surnamed students. Dr. Zintz testified that when Spanish surnamed children come to school and find that their language and culture are totally rejected and that only English is acceptable, feelings of inadequacy and lowered self-esteem develop. Henry Pascual, Director of the Communicative Arts Division of the New Mexico Department of Education, stated that a child who goes to a school where he finds no evidence of his language and culture and ethnic group represented becomes withdrawn and nonparticipating. The child often lacks a positive mental attitude. Maria Gutierrez Spencer, a longtime teacher in New Mexico, testified that until a child developed a good self image not even teaching English as a second language would be successful. If a child can be made to feel worthwhile in school then he will learn even with a poor English program. Dr. Estevan Moreno, a psychologist, further elaborated on the psychological effects of thrusting Spanish surnamed students into an alien school environment. Dr. Moreno explained that children who are not achieving often demonstrate both academic and emotional disorders. They are frustrated and they express their frustration in lack of attendance, lack of school involvement and lack of community involvement. Their frustrations are reflected in hostile behavior, discipline problems and eventually dropping out of school.

Appellants' case centered around the testimony of L.C. Cozzens, Portales' superintendent of schools. Cozzens testified that for the 1971-72 school year out of approximately 80 applications for elementary school teaching positions only one application was from a Spanish surnamed person. Nevertheless, through aggressive recruiting Portales hired six Spanish surnamed teachers. At Lindsey a program was established to teach first graders English as a second language; and with the aid of federal funds a program was also established to serve the needs of pre-school Spanish surnamed children. At the high school level an ethnic studies program was initiated which would be directed primarily at the minority groups and their problems.

The faculty was encouraged to attend workshops on cultural awareness. Altogether over a third of the entire faculty attended one or more of these workshops.

After hearing all evidence, the trial court found that in the Portales schools Spanish surnamed children do not have equal educational opportunity and thus a violation of their constitutional right to equal protection exists. The Portales School District was ordered to:

> reassess and enlarge its program directed to the specialized needs of its Spanish surnamed students at Lindsey and also to establish and operate in adequate manner programs at the other elementary schools where no bilingual-bicultural program now exists.
>
> ....
>
> Defendant school district is directed to investigate and utilize whenever possible the sources of available funds to provide equality of educational opportunity for its Spanish-surnamed students.
>
> ....
>
> It is incumbent upon the school district to increase its recruiting efforts and, if those recruiting efforts are unsuccessful, to obtain sufficient certification of Spanish-speaking teachers to allow them to teach in the district.

Appellants, in compliance with the court's order to submit a plan for remedial action within 90 days, thereafter filed a proposed plan. In essence the plan provided bilingual education for approximately 150 Lindsey students in grades one through four. Each group would be given instruction in Spanish for approximately 30 minutes daily. A Title VII bilingual program would be instituted for approximately 40 pre-school children. Practically all personnel employed for this program would be Spanish surnamed. At the junior high one Spanish surnamed teacher aide would be employed to help Spanish surnamed children experiencing difficulty in the language arts. At the high school a course in ethnic studies would be offered emphasizing minority cultures and their contribution to society. In connection with this program appellants applied to the State Department of Education for state bilingual funds. These funds would provide one bilingual-bicultural instructor for the school district's other three elementary schools, and one bilingual-bicultural teacher or teacher aide at the junior high school. Seeking other sources of funding was also promised as long as the control and supervision of the programs remained with the local board of education.

Although complying with most of the court's order, appellants noted that because enrollment is declining in the Portales schools there would be fewer teachers employed next year. Thus, very likely there would not be any positions to be filled. If a position becomes vacant, however, the school district promised to make every reasonable effort to secure a qualified teacher with a Spanish surname.

Appellees thereafter filed a Motion for Hearing to hear appellees' objections to appellants' program. The motion was granted and at the hearing, after stating their objections to appellants' proposed plan, appellees introduced their own proposed bilingual-bicultural program. After reviewing both parties' programs, the trial court entered final judgment, adopting and adding the following to its prior memorandum opinion:

I. Curriculum

A. Lindsey Elementary

All students in grades 1-3 shall receive 60 minutes per day bilingual instruction. All students in grades 4-6 shall receive 45 minutes per day bilingual instruction. These times are to be considered a minimum and should not be construed to limit additional bilingual training (i.e. the Title III self-contained classroom for first graders with special English language problems).

A testing system shall be devised for determining the adequacy of the above established time periods with ensuing adjustments (either an increase or decrease in bilingual instruction) as needed.

B. James, Steiner and Brown Elementary

All Spanish-speaking students in grades 1-6 shall receive 30 minutes per day of bilingual instruction. This program should be made available to interested non-Spanish-speaking students as funding and personnel become available to expand the bilingual instruction.

A bicultural outlook should be incorporated in as many subject areas as practicable.

Testing procedures shall be established to test the results of the bilingual instruction and adjustments made accordingly.

C. Junior High

Students should be tested for English language proficiency and, if necessary, further bilingual instruction should be available for those students who display a language barrier deficiency.

D. High School

An ethnic studies course will be offered in the 1973-74 school year as an elective. This course should be continued and others added in succeeding years.

The minimum curriculum schedule set forth in A through D above is not intended to limit other bilingual programs or course offerings currently available in the Portales school system or which will become available in the future.

II. Recruiting and Hiring.

A special effort should be made to fill vacancies with qualified bilingual teachers. Recruiting should be pursued to achieve this objective.

III. Funding

Defendants appear to have complied with the court's directive to investigate and utilize sources of available funding. Efforts should continue in seeking funding for present as well as future programs which will help achieve equality of educational opportunities for Spanish-surnamed students.

Appellants promptly appealed, positing two grounds for reversal. First, appellants suggest that appellees neither have standing nor are suitable parties under Rule 23 to maintain this suit as a class action; second, that failure to afford a program of bilingual instruction to meet appellees' needs does not deny them equal protection of the law when such needs are not the result of discriminatory actions.

Appellants' first argument is that appellees are not suitable parties under Rule 23 to maintain this suit as a class action. In particular, appellants argue that appellees have failed to show that there are questions of law or fact common to the alleged class and that the claims of the representative parties are typical of the claims or defenses of that class. We disagree. National origin discrimination in equal educational opportunities is the alleged basis for this lawsuit. As the complaint and supporting evidence point out, 26 percent of the Portales school population are Spanish surnamed. Nevertheless, prior to the lawsuit there were no Spanish surnamed board of education members, teachers, counselors, or administrators. Nor was any attempt made by Portales school personnel to provide for the educational needs of Spanish surnamed children. These allegations clearly raise questions common to the class which appellees represent and are typical of the claims of that class. We therefore are convinced that appellees fully meet the rigid requirements of Rule 23 and thus properly filed this suit as a class action. *Bossier Parish School Bd.* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), cert. den'd, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350.

Appellants also challenge appellees' standing to bring this suit because appellees have failed to show a personal stake in the outcome of this action. We cannot agree; the complaint was filed by parents of school age children and the Chicano Youth Association. Each minor child is allegedly a student in the Portales schools or was excluded therefrom. The complaint alleges that those and all Spanish surnamed school children have been subject to discrimination by the school district. We believe appellees have satisfactorily alleged that appellants' discriminatory actions caused them injury in fact and hence they have standing to sue. *Flast* v. *Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Bossier Parish School Bd.,* supra.

Appellants next challenge the district court's holding that the Portales municipal schools denied appellees equal protection of the law by not offering a program of bilingual education which met their special educational needs. In light of the recent Supreme Court decision in *Lau* v. *Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), however, we need not decide the equal protection issue. *Lau* is a case which appellants admit is almost identical to the present one. In *Lau* non-English speaking Chinese students filed a class suit against the San Francisco Unified School District. The facts showed that only about half of the 3,457 Chinese students needing special English instruction were receiving it. The Chinese students sought relief against these unequal educational opportunities which they alleged violated the Fourteenth Amendment. The district court denied relief, and the Court of Appeals affirmed, holding that there was no violation of the equal protection clause of the Fourteenth Amendment nor of § 601 of the Civil Rights Act of 1964. The Supreme Court, without reaching the equal protection clause argument but relying solely on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, reversed the Court of Appeals.

The Supreme Court notes that the State of California requires English to be the basic language of instruction in public schools. Before a pupil can receive a high school diploma of graduation he must meet the standards of proficiency in English. A student who does not understand the English language and is not provided with bilingual instruction is therefore effectively precluded from any meaningful education. The Court concludes that such a state imposed policy, which makes no allowance for the needs of Chinese-speaking students, is prohibited by § 601. The reason for this is that § 601 bans discrimination based "on the ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance." In reaching its conclusion the Court relies heavily upon HEW regulations that require school systems to assure that students of a particular national origin are not denied the opportunity to obtain the education generally obtained by other students in the system. In particular the Court noted that HEW has ordered school systems to take remedial steps to rectify language deficiency problems.

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. 35 Fed.Reg. 11595 (1970).

Finally, the Court reasons that because the San Francisco school district contractually agreed to comply with Title VI of the 1964 Civil Rights Act and all HEW regulations, the federal government can fix the terms on which its money allotments to that district will be disbursed. The case was accordingly remanded to the Court of Appeals for the fashioning of appropriate relief.

As noted above, the factual situation in the instant case is strikingly similar to that found in *Lau*. Appellees are Spanish surnamed students who prior to this lawsuit were placed in totally English speaking schools. There is substantial evidence that most of these Spanish surnamed students are deficient in the English language; nevertheless no affirmative steps were taken by the Portales school district to rectify these language deficiencies.

The trial court noted in its memorandum opinion that appellees claimed deprivation of equal protection guaranteed by the Fourteenth Amendment and of their statutory rights under Title VI of the 1964 Civil Rights Act, specifically § 601. While the trial court reached the correct result on equal protection grounds, we choose to follow the approach adopted by the Supreme Court in *Lau*; that is, appellees were deprived of their statutory rights under Title VI of the 1964 Civil Rights Act. As in *Lau*, all able children of school age are required to attend school. N.M.Const. Art. XII, § 5. All public schools must be conducted in English. N.M.Const. Art. XXI, § 4. While Spanish surnamed children are required to attend school, and if they attend public schools the courses must be taught in English, Portales school district has failed to institute a program which will rectify language deficiencies so that these children will receive a meaningful education. The Portales school curriculum, which has the effect of discrimination even though probably no purposeful design is present, therefore violates the requisites of Title VI and the requirement imposed by or pursuant to HEW regulations. *Lau*, supra.

Appellants argue that even if the school district were unintentionally discriminating against Spanish surnamed students prior to institution of this lawsuit, the program they presented to the trial court in compliance with the court's memorandum opinion sufficiently meets the needs of appellees. The New Mexico State Board of Education (SBE), in its Amicus Curiae brief, agrees with appellants' position and argues that the trial court's decision and the relief granted constitute unwarranted and improper judicial interference in the internal affairs of the Portales school district. After reviewing the entire record we are in agreement with the trial court's decision. The record reflects a long standing educational policy by the Portales schools that failed to take into consideration the specific needs of Spanish surnamed children. After appellants submitted a proposed bilingual-bicultural program to the trial court a hearing was held on the adequacies of this plan. At this hearing expert witnesses pointed out the fallacies of appellants' plan and in turn offered a more expansive bilingual-bicultural plan. The trial court thereafter fashioned a program which it felt would meet the needs of Spanish surnamed students in the Portales school system. We do not believe that under the unique circumstances of this case the trial court's plan is unwarranted. The evidence shows unequivocally that appellants had failed to provide appellees with a meaningful education. There was adequate evidence that appellants' proposed program was only a token plan that would not benefit appellees. Under these circumstances the trial court had a duty to fashion a program which would provide adequate relief for Spanish surnamed children. As the Court noted in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971), "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Under Title VI of the Civil Rights Act of 1964 appellees have a right to bilingual education. And in following the spirit of *Swann*, supra, we believe the trial court, under its inherent equitable power, can properly fashion a bilingual-bicultural program which will assure that Spanish surnamed children receive a meaningful education. See also *Green* v. *School Bd.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed. 2d 716 (1968); *Brown* v. *Bd. of Education* (II), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). We believe the trial court has formulated a just, equitable and feasible plan; accordingly we will not alter it on appeal.

☙ The New Mexico State Board of Education stresses the effect the decision will have on the structure of public education in New Mexico. It is suggested that bilingual programs will now be necessitated throughout the state wherever a student is found who does not have adequate facility in the English language. We do not share SBE's fears. As Mr. Justice Blackmun pointed out in his concurring opinion in *Lau*, numbers are at the heart of this case and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist.

NOTES

*Honorable James R. Durfee, United States Court of Claims, sitting by designation.

1. Lindsey school's enrollment consisted of nearly 86 percent Spanish surnamed children while the ethnic composition of students at the other three elementary schools was 78 to 88 percent Anglo.

Rosa Marie RIOS et al., Plaintiffs,

v.

Henry P. READ et al., Defendants.

No. 75 Civ. 296.

United States District Court,
E.D. New York.
Oct. 13, 1978.

Puerto Rican Legal Defense & Ed. Fund, Inc., New York City, for plaintiffs; Robert Hermann, Peter Bienstock, Idelisse Malave, New York City, of counsel.

Teitelbaum & Hiller, New York City, for plaintiffs; Herbert Teitelbaum, New York City, of counsel.

Pelletreau & Pelletreau, Patchogue, N. Y., for defendants; Frederic L. Atwood, Vanessa M. Sheehan, Patchogue, N.Y., of counsel.

Memorandum of Decision and Order

MISHLER, Chief Judge.

THE COMPLAINT

The individual named plaintiffs who are of Puerto Rican ancestry, bring this action on behalf of their children who attend school in the Patchogue-Medford School District. They claim that their children have English language deficiencies and that they are deprived equal educational opportunity with monolingual English speaking students. Plaintiffs contend that this is a violation of the equal protection of laws guaranteed by the fourteenth amendment to the Constitution of the United States (Complaint par. 24) and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq. and the regulations promulgated thereunder.[1]

The named plaintiffs bring the action as representatives of a class certified by the order of this court dated February 3, 1976 as Puerto Rican and Hispanic children attending school in the Patchogue-Medford School District who are unable to understand the courses taught in the district because of deficiencies in understanding the English language.

THE ANSWER

Defendants are school officials and members of the Board of Education of the Patchogue-Medford School District who are charged with the duty of complying with Federal and State statutes and regulations relating to the education of children attending schools in the District. Their answer generally denies the material allegations of the complaint and affirmatively alleges that the District offers a bilingual program that adequately meets the needs of students whose dominant language is Spanish and which fully complies with the constitutional and statutory mandate requiring the same learning opportunity be affored to Spanish speaking students as their English speaking counterparts. Additionally, the answer alleges affirmative defenses, lack of subject matter jurisdiction and failure to exhaust administrative remedies.[2]

A trial of the issues was to the court without a jury. The court finds:

The School District

The Patchogue-Medford School District is located in Suffolk County on the south shore of Long Island, approximately 60 miles east of New York City. The District has jurisdiction over the public school system in the Village of Patchogue and the Hamlet of Medford. The total population within its territorial jurisdiction is approximately 55,000. Its school population is approximately 11,000 students of whom approximately 800 are Hispanic. The school district operates seven elementary schools (kindergarten to grade 5), three middle schools (grades 6 to 9) and one high school (grades 10 to 12).[3]

Supervision of the Bilingual Education Program

From July 1972 to July 1977 the school district offered a bilingual education program under the leadership of Paul Hauser, the director of Pupil Services.[4] From September 1974 to June 1976, the bilingual education program was under the direct supervision of Dr. Ildefonso Cabrera, a bilingual teacher, as chairman of the bilingual department. In July 1977, Frank John Rossi, succeeded Mr. Hauser as supervisor of the bilingual education program in a newly created post of Director of Instructional Services which included responsibility for the entire bilingual education program of the school district from kindergarten to grade 12.

Students Enrolled in the Bilingual Program

Of the approximate 800 Hispanic children attending school only 186 participate in the bilingual program: they are distributed (as of the fall term, 1977) throughout the school system as follows:

163 of the 186 students in the bilingual education program emigrated from Puerto Rico.

Elementary Schools			[Grade]					Bilingual Pupils in Special Ed. [Not Graded]	Total in Bilingual Program	Total Hispanics in School Fall 1977
	K	1	2	3	4	5	6			
Barton Ave.	5	7	3	2	1	1			19	59
Bay Ave.	1	3	2	5	1	1			16	48
Canaan	2	·	·	·	·	·			2	44
Eagle Drive	2	3	5	2	2	·	2	3	17	82
Medford Ave.	2	12	3	8	5	2			32	67
River Ave.	6	6	5	6	2	1		1		
Tremont Ave.	·	·	·	·	·	·				
Total of Grade	18	31	18	23	11	5	2		26	81
										67
				[Grade]				4	112	
Middle Schools			6	7	8	9				
									10	39
Oregon Ave.			5	1	2	2			7	102
Saxton St.			3	1	1	2			32	85
So. Ocean Ave.			7	8	10	7				
Total of Grade			15	10	13	11			49	
			[Grade]							
Senior High School			10	11	12					
			11	11	3				25	176
								Total Students	186	

The Bilingual Teaching Staff

In 1978 the school district's Spanish bilingual program consisted of six full-time bilingual teachers, one part-time bilingual teacher and six bilingual aides. The bilingual teachers report to and are evaluated by Mr. Rossi and the principals of the schools. Mr. Rossi does not speak Spanish; he is unfamiliar with the methodology of teaching English as a second language and has neither education nor training in bilingual education. It appears that the principals who are called upon to evaluate the performance of bilingual teachers are unfamiliar with bilingual teaching methods and do not understand Spanish. They only observe the teachers as required "according to the contract between the Teachers Union and the Board of Education." (Rossi Tran. p. 28)

Of the bilingual teachers appointed since the commencement of this action only Dr. Ferdinand Contino (whose native language is English) and Mrs. Estrella Lopez (whose native language is Spanish) appear to have the formal training for bilingual teaching. The record indicates that the other bilingual teachers hired in 1975 are qualified to teach Spanish, but that they lack formal training in the methodology of Spanish bilingual teaching.

Identification

Prior to 1975, identification of children with English language deficiencies was made on an informal basis, through either observations made by school personnel or by a child's or parent's admission of language difficulties. In May 1975,[5] the school district, on Mr. Hauser's recommendation, administered two subtests of the Stanford Achievement Test (listening comprehension and vocabulary) solely to assess proficiency in spoken English.[6] It does not measure reading or writing skills in English or Spanish.

In June 1977 the school district conducted a Language Dominance Survey of all Hispanic children who had exhibited language deficiencies on the Stanford Achievement test in 1977. (Hauser Tran. p. 685)[7]

The Transitional Program

As defendants view their obligations, it is to "teach the child to be able to read and write English within three years." (Hauser Tran. p. 672).

Students with English language deficiencies are instructed in English with their English speaking counterparts unless the classroom teacher recognizes a need for bilingual instruction. (Rossi Tran. p. 42).[8]

There is no established procedure for referring students to bilingual instructors. Often a student's language deficiency comes to the attention of a bilingual teacher only in an informal manner, e.g., in casual conversation among teachers at lunch. In the middle schools and high school, the bilingual teacher is made aware of a student's need for instruction when it happens to be mentioned in casual conversation with other teachers or when evidence of it somehow crosses his path.[9]

Instruction for English language deficient students is in the English language. Some instruction is offered to kindergarten students and first-graders in Spanish; but in each successive grade such students receive less instruction in Spanish and few continue in the program in the middle schools—none in the high school. No text books in Spanish are available. English language deficient students receive an average of 40 to 50 minutes a day in subject matter instruction in Spanish and the remainder of the school day in English. (Rossi Tran. p. 47). The program does not have sequentially planned instruction in subject matters in Spanish. Nor does it offer Spanish cultural instruction.

The school district's bilingual education program is basically a course in English. English is taught to Spanish speaking children during periods when their English speaking counterparts are instructed in science and social studies. (Cabrera Tran. p. 1255).

Exiting Students From the Bilingual Program

No standard test is used to determine when the student has reached the required level of competency in English. The Stanford Achievement Test, which measures the capability of the child to understand spoken English, is the usual test for exiting a child from the English as a Second Language ("ESL") Program.[10] At times bilingual teachers make the determination; at times students are dismissed from the program against the advice of the bilingual teacher (Remien deposition p. 55).

Defendants' Position

Defendants argue: (1) there are not enough pupils with English language deficiencies in the District to warrant application of the *Lau* Guidelines as a minimum standard; (2) nevertheless the Transitional Bilingual Program of the school district is in substantial compliance with the *Lau* Guidelines; (3) the program is "highly effective and successful in achieving its objectives" (Defendants' Post-Trial Fact Memorandum, pps. 62-63); and (4) the Bilingual Education Act of 1974, 20 U.S.C. § 880b et seq. is not applicable.

Discussion

The threshold question of jurisdiction is presented on defendants' argument that primary jurisdiction of plaintiffs' claim lies with HEW and that this court acquires jurisdiction only upon the exhaustion of the administrative remedies available under the regulations promulgated by HEW. Appellate authority on this specific issue is lacking.

Recently, the Supreme Court while assuming for the purpose of the case before it that Title VI granted a private right of action, held it "need not pass upon [the] claim that private plaintiffs under Title VI must exhaust administrative remedies." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 2745, 57 L.Ed.2d 750 (1978).[11]

The procedures established by HEW to effectuate the provisions of Title VI (45 C.F.R. § 80) are designed to seek voluntary compliance with the statutory mandate. If "noncompliance cannot be corrected by informal means, compliance . . . may be effected by suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law." (45 C.F.R. § 80.8) Such administrative proceedings are not designed to give the type of relief that is available in the District Court. They may, in fact, defeat the purpose of the private litigant by terminating the allocation of funds and the bilingual program. Plaintiffs seek continuance of the funding in order to provide an adequate bilingual program in compliance with Title VI. There is some lower court authority for the proposition that exhaustion of administrative remedies is a prerequisite to bringing suit under Title VI. See *Taylor* v. *Cohen*, 405 F.2d 277 (4th Cir. 1968); *NAACP* v. *Wilmington Medical Center, Inc.*, 426 F.Supp. 919 (D.Delaware 1977); *Dupree* v. *City of Chattanooga, Tennessee*, 362 F.Supp. 1136 (E.D. Tenn. 1973). These cases are inapposite. They involved either efforts to enjoin administrative action which had already commenced, or to obtain from the courts the same type of relief which could be had under the administrative apparatus provided under Title VI. None of the cases involved situations, like the one at bar, where following the administrative procedures would frustrate the very purpose of plaintiff's suit and destroy the opportunity for a nondiscriminatory education program. The court believes that, at least in the situation before it today, the doctrines of primary jurisdiction and exhaustion of administrative remedies are not a bar to suit under Title VI. This result is strongly suggested by numerous instances in which private litigants have been allowed to prosecute claims under Title VI without requiring exhaustion of administrative remedies. See *Regents of the University of California* v. *Bakke*, supra; *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Jefferson* v. *Hackney*, 406 U.S. 535, 549-50, 92 S.Ct. 1724, n. 19, 32 L.Ed.2d 285 (1972); *Serna* v. *Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974); *Gautreaux* v. *Romney*, 448 F.2d 731 (7th Cir. 1971); *Pabon* v. *Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976).

The administrative procedures under Title VI provide no effective remedy to the plaintiffs. To require exhaustion of administrative remedies would be futile and counter-productive. Deference to HEW Administrative procedures would be inappropriate in this case. See *Rosado* v. *Wyman*, 397 U.S. 397, 405–406, 90 S.Ct. 1207, 1214–1215, 25 L.Ed.2d 442 (1970).

The Lau Guidelines—The Statutory Obligations

In the wake of *Lau* v. *Nichols*, supra, the Office of Civil Rights of HEW created a task force with a view to establishing standards of compliance with the statutory provisions of Title VI and the regulations issued thereunder relating to educational programs.[12]

In the summer of 1975 the task force made its findings and specified "Remedies Available For Eliminating Past Educational Practices Ruled Unlawful Under *Lau* v. *Nichols*." The Office of Civil Rights uses the *Lau* remedies (or guidelines) in determining whether a bilingual school district program is in compliance with Title VI.[13]

Defendants do not challenge the use of the *Lau* Guidelines as an internal document of the Office of Civil Rights, but they question its use and/or value in the case at bar. In claiming primary jurisdiction for HEW, they apparently would not object to application of the guidelines by HEW. The guidelines do nothing more than supply the mechanism for testing compliance with Title VI as administered pursuant to its regulations, 45 C.F.R. §§ 80.3(b)(i)(ii) and (iv).[14] The use of the guidelines is not restricted to administrative procedures.

Defendants interpret the *Lau* Guidelines as supporting "maintenance" bilingual programs (citing the deposition of Noel Epstein at p. 28). The court does not interpret the *Lau* Guidelines as expressing any philosophy of bilingual education. It merely sets standards for determining compliance with the statutory obligations relating to bilingual education.

The purpose of the statutes, i.e., Title VI, § 204(f) of the Equal Educational Opportunities Act of 1974, the Bilingual Education Act of 1974, and the Civil Rights Act of 1871, as they relate to bilingual education is to assure the language-deficient child that he or she will be afforded the same opportunity to learn as that offered his or her English speaking counterpart. Taken together, the statutes, and the legislative history, see discussion in *Cintron* v. *Brentwood Union Free School District*, 455 F.Supp. 57 (E.D.N.Y. 1978), mandate teaching such children subject matter in their native tongue (when required) by competent teachers. Though not expressly provided by statute, the legislative history suggests that the program must also be bicultural as a psychological support to the subject matter instruction. *Serna* v. *Portales Municipal Schools*, supra; H.R.Rep. 93–805, 93rd Cong. 2nd Sess., reprinted in [1974] U.S. Code Cong. & Admin.News, p. 4093.[15]

The Bilingual Program—The Staff

Prior to the institution of this action the teaching staff of bilingual teachers consisted only of Dr. Cabrera and Mrs. Catullo. Four teachers have been added to the staff since the commencement of this action. The teachers have had little or no training in bilingual educational programs or methodology. The District failed to provide inservice training for bilingual teachers or a program of continuing education in the field.

Type of Program

The bilingual program before commencement of this action was almost totally geared toward teaching English as a second language (ESL). Subsequent to the commencement of this action, Hispanic students were offered instruction in Spanish upon request or the chance choice or whim of the home class teacher, bilingual teacher or principal.

The program is designed to "mainstream" the student as soon as he or she indicates some comprehension of spoken English. In kindergarten and the first three grades, the curriculum is basically reading and mathematics; in the fourth and fifth grades, the curriculum is basically science and social studies. Language deficient students are in the same home class as English speaking students. When the student is identified by the home class teacher, or the bilingual teacher or principal as being unable to comprehend the instruction, he or she is then referred to the bilingual teacher for instruction in the subject matter in Spanish. Evaluation of the ability of language deficient students is based on the opinion of the home teacher or bilingual teacher. In the middle school[16] the amount of bilingual instruction and type of instruction is determined by the bilingual teacher and/or the home class teacher. In the high school, the bilingual teacher and aide are available for students who attend during their free periods.[17]

The bicultural program is limited in the high school to a course in Puerto Rican studies taught in Spanish and some extracurricular activities, e.g., special events, clubs, etc. In the middle and elementary schools some reading material relating to Spanish history and art is made part of social studies and literature. The District encourages other Spanish events and activities outside the school curriculum, e.g., Puerto Rican Discovery celebration, Christmas celebration consistent with Hispanic culture and tradition.

Identification of English Language Deficient Students

Since May 1975, the school district has been testing Hispanic students for oral English proficiency. The test, known as the Stanford Achievement Test, consists of two subtests: one for listening comprehension and one for vocabulary. As previously discussed, it does not measure reading or writing skills in English. In 1977 the District made a Language Dominance Survey of the Hispanic students who received scores in the lowest three stanines[18] on the Stanford Achievement Test. The survey identified the language that was: (i) first acquired, (ii) most often spoken in the home, (iii) most often spoken in social situations. Students were classified according to their language skills. Those who were monolingual Spanish or spoke Spanish predominantly were placed into the ESL program. Those who were bilingual or spoke only English were not included in the program.

Mainstreaming

Students are exited from the bilingual or ESL program on the determination by the bilingual teacher without any objective or validated test. Students have been found to have reached the level of competency in English which qualifies them for instruction in English by retesting on the Stanford Achievement Test. The test is not valid for that purpose.[19]

Conclusion

Defendants describe the school district's bilingual program as "a transitional bilingual program stressing ESL and including substantive bilingual instruction in content courses with bilingual components as a part of these text materials supplemented by bicultural activities. . . ." They argue that the program is "highly effective and successful in achieving its objective." (Def. Post Trial Memo., p. 63).

However, plaintiffs' charge that they are being denied equal educational opportunity is not sufficiently answered by defendants' efforts to show that their program will eventually attain some desirable results. A denial of educational opportunities to a child in the first years of schooling is not justified by demonstrating that the educational program employed will teach the child English sooner than programs comprised of more extensive Spanish instruction. While the District's goal of teaching Hispanic children the English language is certainly proper, it cannot be allowed to compromise a student's right to meaningful education before proficiency in English is obtained.

Thus, the statutory obligations upon the school district require it to take affirmative action for language-deficient students by establishing an ESL and bilingual program and to keep them in such program until they have attained sufficient proficiency in English to be instructed along with English-speaking students of comparable intelligence. The school district has the obligation of identifying children in need of bilingual education by objective, validated tests conducted by competent personnel. It must establish procedures for monitoring the progress of students in the bilingual program and may exit them from the program only after validated tests have indicated the appropriate level of English proficiency.

The school district is not obligated to offer a program of indefinite duration for instruction in Spanish art and culture. The bicultural element is necessary only to enhance the child's learning ability. The purpose is not to establish a bilingual society.

Measured against these obligations the school district's bilingual program is inadequate. It violates plaintiffs' statutory right to equal educational opportunities under Title VI of the Civil Rights Act of 1964, and the Civil Rights Act of 1871, the Equal Educational Opportunities Act of 1974, and the Bilingual Education Act of 1974.

Disposition

The school district is directed to file with the Clerk of this Court a proposed plan for a bilingual educational program in accordance with this memorandum of decision on or before January 31, 1979 and serve a copy of the proposal on plaintiffs on or before December 15, 1978. Plaintiffs shall serve objections (if any) to the plan on defendants on or before January 15, 1979. The plan shall comply with the *Lau* Guidelines.

The court retains jurisdiction over the subject matter of this action for the purpose of making further orders to carry out the provisions of the Judgment to be entered herein.

This Memorandum of Decision contains the findings of fact and conclusions of law required under Rule 52.

The Court has simultaneously herewith approved the form of Judgment to be entered in favor of the plaintiffs and against the defendants. The Clerk of the Court is directed to enter the said Judgment. (F.R.C.P. Rule 58).

It is so ordered.

NOTES

1. The complaint also alleges a right under 42 U.S.C. § 1983 in the prayer for relief (Complaint par. 26B).

2. Other affirmative defenses, i.e., failure to join necessary parties, failure to allege a specific act of discrimination are clearly without merit and will not be discussed.

3. The elementary schools are known as Barton Ave., Bay Ave., Canaan, Eagle Drive, Medford Ave., River Ave., and Tremont Ave.; the middle schools are known as Oregon Ave., Saxton St., and So. Ocean Ave.; the high school is called Senior High School.

The time of the institution of the bilingual education program and its development is obscure. In 1969 a program was offered by Mrs. Dramine Catullo whose first language is Spanish. Before employment as a Spanish bilingual teacher by the school district in 1969, she taught Spanish, French and English in high school but had neither training nor experience as a bilingual teacher. She recently enrolled in C.W. Post College in its bilingual cultural program leading to "elementary certification." (Tran. pps. 1135-7)

4. The bilingual education program was only one of many duties with which Mr. Hauser was charged. He also coordinated various supportive service programs and special needs programs, e.g., attendance procedures, drug counseling programs, guidance counseling service programs, health programs, in-district services by personnel such as nurses, health aids, speech correction services, contract services for handicapped children, etc.

5. Mr. Hauser testified that from the time he became Director of Pupil Service in 1972 to 1975 he made an exhaustive search for a diagnostic test (to determine a child's competency in English) and a mastery test (to monitor a child's progress).

6. Dr. Raymond J. Sullivan called by defendants as an expert on evaluation designs for bilingual education programs had written Mr. Hauser on April 23, 1975 recommending tests for all grade levels to measure "the ability of these children to comprehend spoken English." (Ex. 7). The Stanford Achievement Test had been available since 1973 (Ex. 8).

7. The survey attempted to identify the language first acquired, the language most often spoken at home and the language most often spoken in social situations.

8. The exception is the River Ave. School where the Open Court Bilingual Program (deriving its name from Open Court Publishing Co.) is given to first graders. It consists of six children. The instruction is in Spanish and then translated into English.

9. Dr. Cabrera testified:

"Q. How do you coordinate the program with the classroom teachers?

"A. First in a very informal manner. Just when we are in the cafeteria, in the lunchroom, we talk about the students. They are mainly the topic of our conversations. So, I know how they are doing, what they need. Otherwise when I see that the person needs special attention, I go personally to see the teacher and to discuss the situation with the teacher and with the counselor also, the guidance counselor." (Tran. p. 1233).

10. Dr. Sullivan testified that the score on the Stanford test alone is an unreliable test for eliminating a student from a bilingual program (Sullivan Tran. pps. 306–308).

11. The Court did not pass on whether a private right of action maybe implied under Title VI since it "was neither argued nor decided in either of the courts below. . . ." Mr. Justice Stevens' concurring opinion (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Rehnquist) noted that "[t]o date, the courts, including this Court, have unanimously concluded or assumed that a private right of action may be maintained under Title VI." 95 S.Ct. at 2814. The issue was not raised here. As in *Bakke* and *Lau* v. *Nichols*, 414 U.S. 563, 571 n.2, 94 S.Ct. 786, 790, 39 L.Ed.2d 1 (1974) the court assumes that plaintiffs have a private right of action. Were the issue raised we would find that Congress intended the private plaintiffs have a right of action under Title VI. *Serna* v. *Portales Municipal Schools*, 499 F.2d 1147, 1152–1154 (10th Cir. 1974).

12. Earlier, in 1970, HEW had published a regulation interpreting Title VI which stated in pertinent part:

> Where inability to speak and understand the English language excludes national origin—minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. 35 Fed.Reg. 11595.

13. Robert J. Baca, an attorney on the staff of General Counsel to the Office of Civil Rights testified that when a complaint of a Title VI violation relating to a bilingual program is filed, the investigators use the *Lau* Guidelines. "The *Lau* Guidelines is the material used to tell you what to look for when you go in and do an investigation." (Baca Deposition, p. 15). He indicated that a school district's compliance with Title VI is measured against the "Lau Analysis Form." (Baca deposition, p. 12).

14. 45 CFR §§ 80(3) b(ii) and (iv) provide that recipients of *any* program may not

> "(ii) Provide any service, financial aid, or other benefit which is different, or is provided in a different manner from that provided to others under the program;
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or other benefit under the program;. . . ."

. . . .

15. The report states the need of "the use of two languages, one of which is *English*, as the media of instruction in a comprehensive school program. There is evidence that use of the child's mother tongue as a medium of instruction concurrent with an effort to strengthen his command of English acts to prevent retardation in academic skill and performance. The program is also intended to develop the child's self-esteem and a legitimate pride in both cultures. Accordingly, a bilingual education normally includes a study of the history and cultures associated with the mother tongue."

16. Mrs. Remien, the bilingual teacher, testified that she had 19 students in the ESL program and 13 additional students who came to her for Spanish instruction in particular subjects.

17. Only two to five students in each class are language deficient.

18. Stanines indicate a range of competency from one to nine. The survey was conducted of only those students scoring in the first three stanines, though 139 students in the fourth stanine were below average in oral English comprehension.

19. In describing the effectiveness of the program, Mr. Hauser, using the categories defined in the *Lau* Guidelines from A to E testified that most of the children in the bilingual program are in B categories, i.e. predominantly speak a language other than English ("speaks mostly the language other than English, but speaks some English") and after three years in the program are in either C category ("Bilingual"), D category ("Predominantly speaks English") or E category ("Monolingual speaker of English").

UNITED STATES of America, Plaintiff,
Mexican American Legal Defense Fund,
LULAC and G.I. Forum,
Plaintiffs-Intervenors,
v.
STATE OF TEXAS et al., Defendants.
Civ. A. No. 5281.

United States District Court,
E.D. Texas,
Tyler Division
Jan. 12, 1981.

Joseph D. Rich, David Birnbaum, Richard Epps, Terry Milton, Jeremiah Glassman, Civ. Rights Div., Dept. of Justice, Washington, D.C., Drew S. Days, III, Asst. Atty. Gen., Washington, D.C., John H. Hannah, Jr., U.S. Atty., E.D. Texas, Tyler, Tex., for plaintiff.

Peter D. Roos, Vilma S. Martinez, Linda Hanten, Ricardo De Anda, Mexican-American Legal Defense and Education Fund (MALDEF), San Francisco, Cal., Roger Rice, Harvard Center for Law and Education, Cambridge, Mass., Norma Solis, Mexican-American Legal Defense and Education Fund (MALDEF), San Antonio, Tex., for plaintiffs-intervenors.

Susan J. Dasher, Asst. Atty. Gen. of Texas, Mark White, Atty. Gen. of Texas, John W. Fainter, Ted L. Hartley, Paul R. Gavia, Roland Allen, David M. Kendall, Steve Bickerstaff, Robert Giddings, Asst. Attys. Gen., Austin, Tex., for defendants.

MEMORANDUM OPINION

JUSTICE, Chief Judge

I. PROCEDURAL HISTORY

This civil action was instituted by the United States on March 6, 1970. The complaint charged that the defendant State of Texas and its agents, including the Texas Education Agency (hereinafter referred to as "TEA"), had created and maintained nine all-Black school districts throughout the state and had failed to provide equal educational opportunity without regard to race. The complaint further alleged that the State of Texas, through the TEA—as the chief supervisory body of public education in Texas and as the disburser of state educational assistance and federal funds—had failed to oversee and supervise the school districts within the state, to ensure that no child was denied the benefits of federally-supported programs on the grounds of race, color, or national origin.

A trial was held in September, 1970. In an order entered November 24, 1970, the defendants were found to be in violation of both the Constitution and federal law. Accordingly, TEA was required to desegregate the all-

Black districts and to submit a comprehensive enforcement plan to ensure equal educational opportunity for all students in the state. D.C., 321 F.Supp. 1043 (1970). After the submission of a proposed plan and a series of hearings, an order was entered mandating that TEA implement a comprehensive enforcement plan, which was set forth in conjunction with the order. D.C., 330 F.Supp. 235 (1971).

With minor modifications, the Court of Appeals for the Fifth Circuit subsequently affirmed the November 24, 1970, order. 447 F.2d 441 (1971). A revised order was issued on July 13, 1971, to conform with the directives of the Court of Appeals. Justice Black thereafter denied a motion by the state defendants to stay implementation of this order, 404 U.S. 1206, 92 S.Ct. 8, 30 L.Ed.2d 10 (1971), and certiorari was subsequently denied by the Supreme Court. 404 U.S. 1016, 92 S.Ct. 675, 30 L.Ed.2d 663 (1972). Thus, the revised order of July 13, 1971, remains in effect in this action.

Section G of the order, entitled "Curriculum and Compensatory Education," required the TEA to carry out a study of the educational needs of minority children throughout the state and to report their findings to the court by August 15, 1971. The report was to include, inter alia,

> (a) Recommendations of specific curricular offerings and programs which will insure equal educational opportunities for all students regardless of race, color or national origin. These curricular offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities and ethnic isolation, as well as programs and curriculum designed to meet the special educational needs of students whose primary language is other than English;
>
> (b) Explanation of presently existing programs funded by the State of Texas or by the Federal Government which are available to local districts to meet these special educational needs and how such programs might be applied to these educational needs;
>
> (c) Explanation of specific standards by which the defendants will determine when a local district, which has racially or ethnically isolated schools or which has students whose primary language is other than English, shall be required by the defendants to participate in the special compensatory educational programs available; and
>
> (d) Explanation of procedures for applying these standards to local districts including appropriate sanctions to be employed by the defendants should a district refuse to participate in special compensatory educational programs where it has been instructed to do so pursuant to application of the standards developed under subsection (c) above.

TEA filed a timely response to the Section G requirements, in the form of an 86-page document entitled "T.E.A. Plan for Meeting Requirements of Section G" and a 17-page document entitled "Alternative Programs to Improve Curriculum for Minority Students." In submitting these reports, the agency did all that it had been required to do under Section G. No other specific actions were immediately mandated by the order directing TEA to address the learning problems of students whose primary language was other than English. TEA's proposals, as contained in these two documents, were never the subject of a hearing, nor was any order entered which approved or rejected them.

Another pertinent section of the order of July 13, 1971, Part J(1), provided:

> This court retains jurisdiction of this matter for all purposes, and especially for the purpose of entering any and all future orders which may become necessary to enforce or modify this decree.

It is this provision which authorizes consideration to be given to the supplemental claims which have now been brought.[1]

A motion to intervene, filed by the GI Forum and the League of United Latin American Citizens (LULAC), was granted on July 10, 1972, which allowed such parties to participate in this action "for all purposes as representatives of all persons of Mexican-American descent or nationality in the State of Texas." On June 3, 1975, the GI Forum-LULAC intervenors moved for enforcement of Section G of the court's prior order and for supplemental relief, claiming that Mexican-American students in the Texas public schools were being denied equal educational opportunity as required by law. In their demand for relief, the intervenors called for TEA to implement a plan which would provide all limited English proficiency students with bilingual instruction and compensatory programs, to overcome the effects of the unavailability of bilingual instruction in the past. An amended motion, naming twenty-six individual Mexican-American children as party plaintiffs, was subsequently filed. The United States has also moved for enforcement of Section G and for supplemental relief which is similar, though not identical, to that demanded in the motion filed by the GI Forum-LULAC intervenors.

At the trial of the case, the parties submitted voluminous documentary materials and numerous stipulations of fact, which were received in evidence. Following trial, all parties submitted extensive post-trial memoranda. This memorandum opinion contains findings of fact and conclusions of law as to these claims, as authorized by F.R. CIV.P. 52(a).

As noted above, the response of the court in 1971 to the special educational needs of limited English proficiency children was simply to require the report described in Section G. The trial of the case had primarily focused upon the existence of a dual school system in Texas based upon race. While evidence was received on the maintenance of separate schools for children of Mexican-American ancestry throughout the state, no expert testimony was offered on the related problem of ethnic-based language barriers. Thus, while it was determined that equal educational opportunity should be afforded to Spanish-speaking students, no record existed on which to base specific findings as to the extent of the language problem in the state's public schools or how that problem could best be remedied.

The study and report by TEA called for in Section G were intended to begin the process of eliminating the vestiges of discrimination against these children in the field of education by dealing directly with the language barrier. But the suggestion by plaintiffs that the comprehensive bilingual education program they now seek was somehow inherent in Section G and must now be implemented under the doctrine of res judicata is erroneous. Section G of the court's 1971 order required only the filing of a report to propose remedial programs. That requirement was satisfied in a timely manner by TEA. Section G contained no specific guidelines concerning the scope or characteristics of any compensatory program. Given the paucity of evidence which had been received on the language problem at that time, such specificity would have been unwarranted. If the extensive relief now sought by plaintiffs is appropriate, it must be predicated upon the mass of evidence presented at trial. Accordingly, the plaintiffs' claim for relief as a means of enforcing Section G of the court's 1971 order will be denied.

II. DE JURE DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT

A. Scope and Impact of the Violation

The evidence presented on the motions for supplemental relief contains proof of pervasive, invidious discrimination against Mexican-Americans throughout the State of Texas. The extent of the discrimination is comparable in magnitude to the overwhelming evidence of state-supported racial segregation which was found more than ten years ago. *United*

States v. *Texas,* 321 F.Supp. 1043 (E.D. Tex. 1970), aff'd. 447 F.2d 441 (5th Cir. 1971). The serious injustices which the Mexican-American minority in Texas has endured at the hands of the Anglo[2] majority is undeniable. Defendants, the State of Texas and the Texas Education Agency, stipulated to facts documenting this history of discrimination, and defendants' counsel opened her case by conceding: "[T]he State of Texas does not have a happy record over the past." Trial Transcript (TR) 21.

Historical discrimination against Mexican-Americans in the United States has been conclusively established by prior court decisions. E.g., *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U.S. 189, 197-98, 93 S.Ct. 2686, 2691-92, 37 L.Ed.2d 548 (1973); *Graves* v. *Barnes,* 343 F. Supp. 704, 728 (W.D.Tex.1972) (three-judge court) (per curiam), aff'd in pertinent part, sub nom. *White* v. *Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). The extensive disabilities suffered by this minority group in Texas was aptly described in *Graves* v. *Barnes* as follows:

> Because of long-standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases, and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others.

Id. Both the Supreme Court and the Court of Appeals for the Fifth Circuit have recognized that Mexican-Americans comprise a distinct ethnic class for purposes of equal protection under the Fourteenth Amendment. *Keyes,* 413 U.S. at 197, 93 S.Ct. at 2691; *Hernandez* v. *Texas,* 347 U.S. 475, 479, 74 S.Ct. 667, 671, 98 L.Ed. 866 (1954); *United States* v. *Texas Education Agency,* 467 F.2d 848, 852 (5th Cir. 1972) (en banc), aff'd after remand 532 F.2d 380 (5th Cir. 1976), remanded sub nom. *Austin Independent School District* v. *United States,* 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed. 2d 603 (1976), aff'd. 564 F.2d 162 (5th Cir. 1977), cert. denied 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979) (Austin Independent School District).

In the field of public education, discrimination against Mexican-Americans in Texas has been particularly acute. Although ethnic segregation was not mandated by law, as was segregation by race, Tex.Const., Art. 7, § 7 (1876), segregation of Mexican-Americans is a historical fact in Texas public schools. Plaintiff-Intervenors' Exhibit 409, # 701.[3] Beginning in the early years of this century, the establishment of "Mexican schools" took root in the Rio Grande Valley and spread gradually throughout the state. By 1942, such segregated schools existed in at least 122 Texas school districts in fifty-nine different counties. Pl.-Int. Ex. 409, # 729.

State and local education officials justified this practice of segregation, on the grounds that Mexican-American children spoke little English and were often late in arriving at school because their families engaged in migrant labor. See, e.g., *Independent School District* v. *Salvatierra,* 33 S.W.2d 790, 791-93 (Tex.Civ.App.—San Antonio 1930) cert. denied 284 U.S. 580, 52 S.Ct. 28, 76 L.Ed. 503 (1931). In fact, the discrimination was not at all benign. No attempt was made to meet the special educational needs of these children who had limited proficiency with the English language. Pl.-Int. Ex. 409, # 706. On the contrary, the "Mexican schools" were invariably overcrowded, and were inferior in all respects to those open exclusively to Anglo students. Pl.-Int. Ex. 409, # 748.

In furtherance of this state policy, Mexican-American children were prohibited from speaking their native language anywhere on school grounds. Those who violated the "No Spanish" rule were severely punished.

Pl.-Int. Ex. 409, # 710, 711. The statute and rules prohibiting the use of Spanish in the public schools were strictly enforced until 1968. Pl.-Int. Ex. 409, # 514. Rather than attempting to provide adequate schooling for Mexican-American children, Texas educators viewed public education as simply a vehicle for "Americanizing" the "foreign element." Pl.-Int. Ex. 409, # 738. Both the language and cultural heritage of these children were uniformly treated with intolerance and disrespect.

While many of these discriminatory practices were carried out primarily at the local level, the state itself was directly implicated as well. Official publications of the Texas State Department of Education, the predecessor of TEA, reflected a policy of Anglo racial domination over Mexican-American people, their language, and culture. Pl.-Int. Ex. 409, # 704. The state approved construction bonds which school board minutes indicate were explicitly designed for the construction or repair of segregated "Mexican schools." Pl.-Int. Ex. 409, # 750. Even after the illegality of segregating Mexican-American children was clearly established in a 1948 federal court decision, *Delgado* v. *Bastrop Independent School District*, C.A. No. 388 (W.D.Tex.) (unreported), state education authorities cooperated to allow local districts to evade that mandate. Pl.-Int. Ex. 409, # 735.

The legal consequences flowing from this pattern of discrimination must be ascertained through current constitutional standards. Recent Supreme Court decisions have established that proof of discriminatory intent or purpose is required to make out a violation of the Equal Protection Clause. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (*Dayton I*). In the absence of such forbidden purpose, school policies which bring about discriminatory results are not unconstitutional. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973).[4]

Discriminatory purpose is most clearly evident where a dual school system, segregated on the basis of race, has been established by law. Such statutory discrimination is unconstitutional per se under *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*); *United States* v. *Texas Education Agency*, 564 F.2d 162, 165, fn. 2 (5th Cir. 1977) (*Austin III*).

Most recent Equal Protection claims in the field of education have been brought against school systems where discrimination was effectuated by local acts and policies, rather than by law. E.g., *Columbus Board of Education* v. *Penick; Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977) (*Dayton I*), after remand, 433 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (*Dayton II*). Such discrimination, if intentional, is no less forbidden by the Constitution. *Columbus Board of Education* v. *Penick*, 443 U.S. at 457, fn 5, 99 S.Ct. at 2946, fn. 5; *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d at 147. But the post hoc determination of why these various acts and policies were undertaken in the past is often difficult.

Discriminatory purpose may be inferred from the totality of relevant facts. *Washington* v. *Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). In order to prevail, the plaintiff must show that racial or ethnic discrimination was a purpose of the challenged conduct, though not necessarily the sole or dominant one. *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). If the disparate racial or ethnic impact of a particular policy could readily have been foreseen at the time it was implemented, that fact is relevant proof on the issue of whether that policy had an impermissible purpose. *Columbus Board of Education* v. *Penick*, 443 U.S. at 464, 99 S.Ct. at 2950.

Where systemwide discrimination is alleged, as in this case, proof of intentional discrimination within a substantial portion of that system creates a rebuttable presumption that the entire system is operating in violation of the Equal Protection Clause. *Columbus Board of Education* v. *Penick*, 443 U.S. at 458, 99 S.Ct. at 2947; *Keyes*, 413 U.S. at 203, 93 S.Ct. at 2695. Once impermissible intent is shown, the burden shifts to the defendant to prove that the same results would have occurred absent purposeful discrimination of any kind. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *United States* v. *Texas Education Agency*, 579 F.2d 910, 916 (5th Cir. 1978) (denying petition for rehearing) (*Austin Independent School District*).

In determining the presence of a constitutional violation, the remoteness in time of purposeful discrimination is not a viable defense. *Keyes*, 413 U.S. at 210–211, 93 S.Ct. at 2698. If a school system engaged in intentional discrimination on the basis of race or national origin at any time in the past, it bears an affirmative duty to eliminate all vestiges of that discrimination, root and branch. *Dayton II*, 443 U.S. at 537, 99 S.Ct. at 2979; *Keyes*, 413 U.S. at 201, 93 S.Ct. at 2694; *Green* v. *County School Board*, 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). It is not enough for the defendants to abandon their prior discriminatory practices. *Dayton II*, 443 U.S. at 538, 99 S.Ct. at 2979. All of the consequences of that unlawful conduct must be remedied. The failure or refusal to fulfill this duty to extirpate all remaining traces of intentional discrimination after the discrimination itself has ceased constitutes a separate violation of the Fourteenth Amendment. *Columbus Board of Education* v. *Penick*, 443 U.S. at 459, 99 S.Ct. at 2947.

Courts applying these legal principles have found intentional or "de jure" discrimination against Mexican-American children in a number of school districts throughout Texas. E.g., *United States* v. *Texas Education Agency*, 600 F.2d 518 (5th Cir. 1979) (*Lubbock Independent School District*); *United States* v. *Texas Education Agency*, 564 F.2d 162 (5th Cir. 1977), cert. denied, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979) (*Austin III*); *Morales* v. *Shannon*, 516 F.2d 411, 413 (5th Cir. 1975), cert. denied, 423 U.S. 1034, 96 S.Ct. 566, 46 L.Ed.2b 408 (1976) (*Uvalde Public Schools*); *United States* v. *Midland Independent School District*, 519 F.2d 60, 64 (5th Cir. 1975).

A separate segment of this action, involving a claim of unconstitutional segregation suffered by Mexican-American students in the Gregory-Portland Independent School District, was decided in *United States* v. *State of Texas*, 498 F.Supp. 1356 (1980) (*Gregory-Portland Independent School District Intervention*). There, intentional, statewide discrimination against Mexican-American students was found to have been practiced by TEA. It was also determined that TEA had failed to satisfy its obligation to eliminate the vestiges of that unconstitutional conduct throughout the state. While *Gregory-Portland* involved the continued segregation of Mexican-American students in school assignments, rather than their language-based learning difficulties, the court's decision that deliberate ethnic discrimination by TEA existed throughout the state's public schools bears directly upon the instant action.

On the basis of the evidence in this case, a conclusion identical to that reached in the *Gregory-Portland* case is inescapable. There can be no doubt that a principal purpose of the practices described above was to treat Mexican-Americans as a separate and inferior class. Three distinct forms of deliberate discrimination were engaged in. First, these children were restricted on the basis of their ancestry to so-called "Mexican schools." Second, they were provided with facilities, resources, and educational programs vastly inferior to those accorded their Anglo counterparts. Third, the native language and culture of these Mexican-American children were assailed and excluded in an effort to "Americanize" them. Viewed in the context of this concerted program of discrimination against students of Mexican ancestry, the policy of using English exclusively in the Texas public schools must be seen, not as neutral or benign, but rather as one more vehicle to maintain these children in an inferior position.

Intentional discrimination against this minority group, supported by state policies and state funding, characterized public education throughout Texas for many years. The defendants have made no showing that the documented instances of discrimination were isolated aberrations or otherwise outside the responsibility of state authorities. Accordingly, it is found that Mexican-Americans in Texas have been subjected to de jure discrimination by the defendants, the State of Texas and the Texas Education Agency, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Having ascertained the existence of a constitutional violation, it is necessary to determine what consequences, if any, that violation has effected upon the victims of discrimination. The adverse impact of racial or ethnic segregation upon school children is well documented. As the Supreme Court observed more than a quarter century ago, segregation "generates a feeling of inferiority as to their status in the community which may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education,* 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) (*Brown I*). Such treatment affects, not only educational achievement, but social and psychological development as well. See *United States* v. *Texas Education Agency,* 467 F.2d 848, 862, n. 21 (5th Cir. 1972) (en banc), aff'd after remand 532 F.2d 380 (5th Cir. 1976), remanded sub nom. *Austin Independent School District* v. *United States,* 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed. 2d 603 (1976), aff'd 564 F.2d 162 (5th Cir. 1977), cert. denied 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979). Other forms of discrimination, such as suppression of a child's native language and culture and the maintenance of inferior facilities for a particular minority group, compound the gravity of the consequences:

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream.

Milliken v. *Bradley,* 433 U.S. 267, 287, 97 S.Ct. 2749, 2760, 53 L.Ed.2d 745 (1977) (*Milliken II*).

The general principles outlined above apply graphically and disastrously to Mexican-Americans in the state of Texas. Subjected to pervasive, intentional discrimination throughout most of this century, members of this minority group have been severely disabled in their struggle for equal educational opportunity. Defendants have conceded that "the long history of educational neglect of, and discrimination against, Mexican-Americans in Texas has had an adverse impact (on) the educational success of Mexican-American students." FINAL PRETRIAL ORDER at 93. More specifically, defendants acknowledge that negative stereotypes transmitted to

Mexican-American students contribute to low achievement, and that "the 1918 'English Only' law had a severe and debilitating effect on the education of Spanish-speaking children for over 50 years." Pl.-Int.Ex. 409, #8, 709.

While many of the overt forms of discrimination wreaked upon Mexican-Americans have been eliminated, the long history of prejudice and deprivation remains a significant obstacle to equal educational opportunity for these children. The deep sense of inferiority, cultural isolation, and acceptance of failure, instilled in a people by generations of subjugation, cannot be eradicated merely by integrating the schools and repealing the "No Spanish" statutes. *See Milliken II,* 433 U.S at 288, 97 S.Ct. at 2761. In seeking to educate the offspring of those who grew up saddled with severe disabilities imposed on the basis of their ancestry, the State of Texas must now confront and treat with the adverse conditions resulting from decades of purposeful discrimination. The effects of that historical tragedy linger and can be dealt with only by specific remedial measures. Id.

Defendants recognize the continuing effects of their past de jure discrimination against Mexican-Americans. They stipulate that "the use of an all-English ethnocentric curricula which LESA (Limited English-Speaking Ability) children have been taught by monolingual English teachers and English textbooks has resulted in low achievement, frustration, and humiliation for Mexican-American children." Pl.-Int.Ex. 409, 707. Defendants acknowledge further that negative stereotyping and racial isolation are forms of discrimination which still affect the educational experience of Mexican-American students and contribute to their low achievement. Pl.-Int. Ex. 409, # 8, 702.

The severe educational difficulties which Mexican-American children in Texas public schools continue to experience attest to the intensity of those lingering effects of past discriminatory treatment. Some forty-four percent of Mexican-American students suffer from severe reading retardation. Pl.-Int. Ex. 409, # 46. In a study of all sixth graders in the seven largest urban school districts in Texas, Anglo students were reading at an average grade achievement level of 6.21, while Mexican-American students lagged far behind at 4.81. Pl.-Int. Ex. 409, # 9.

As a result of low achievement in reading and other academic subjects. Mexican-American students are compelled to repeat grades far more frequently than Anglo students. More than twenty-two percent of Mexican-American first graders are retained in the same grade, compared to only seven percent of Anglo children. Pl.-Int. Ex. 409, # 47. Not surprisingly, these Mexican-American students, finding themselves behind their grade level peers in achievement, as well as older in age, leave school at a relatively high rate. Nearly one-half, or forty-seven percent, of Mexican-American pupils abandon school before graduation, compared to only fifteen percent of the Anglo students who fail to finish high school. More than one-half of Anglo students enter college, compared to only sixteen percent of their Mexican-American classmates. Pl.-Int. Ex. 409, # 41.

The educational problems of this minority group contribute significantly to their inability to compete successfully for the professional and technical jobs which provide some measure of comfort, status, and power in American society. The Supreme Court's assertion in *Brown* v. *Board of Education, (Brown I),* that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," 347 U.S. at 493, 74 S.Ct. at 691, is probably even more accurate now than it was then. See Gov.Ex. B7 at 1,14. The unemployment rate of Mexican-Americans in Texas is nearly twice that of non-minority adults, Pl.-

Int. Ex. 409, # 5, but this is only another manifestation of the underlying problem. Without adequate educational training and credentials, these individuals are restricted to the least challenging and rewarding occupations which society offers. Thus, while they may ultimately be employed in some fashion, many Mexican-Americans continue to suffer throughout life from the educational opportunities they were denied as children.

The crippling educational deficiencies afflicting the main body of Mexican-Americans in Texas presents an ongoing ethnic tragedy, catastrophic in degree and disturbing in its latency for civil unrest and economic dislocation. A Mexican-American public school enrollment estimated at 813,325 registered in the 1980-81 school year, and a steady increase to 941,875 by 1983-84 is projected. Gov. Ex. K14. Unless the state succeeds in overcoming the vestiges of past discrimination and educates these children effectively, some one million members of this group will soon grow to maturity, unable to participate fully in or contribute meaningfully to this nation's society.

That the defendants' unconstitutional practices have contributed substantially to the special learning problems encountered by Mexican-American children and that vestiges of that past discrimination remain, producing deleterious results today, is uncontested. Defendants have conceded the direct, causal relationship between their past actions and current conditions in the Texas public school system. In particular, the defendants' treatment of these children as inferiors, prohibited from using their native language within the schools, was an act of purposeful discrimination with profound consequences. In effect, defendants' past conduct created a learning disability which will continue to impede Mexican-American children until it is completely eradicated.

The record in this case demonstrates pervasive, systemwide discrimination against Mexican-American children in the field of education. The systematic nature of the violation constitutes proof, in itself, that current language-based learning problems suffered by these children were caused, at least in part, by prior unlawful actions by defendants. See *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 537, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979) *(Dayton II)*. Defendants bear the burden of demonstrating that current conditions would be unchanged in the absence of their discriminatory conduct. Id.; *Keyes* v. *School District No. 1, Denver, Col.*, 413 U.S. 189, 211, fn. 17, 93 S.Ct. 2686, 2699, fn. 17, 37 L.Ed.2d 548 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26, 91 S.Ct. 1267, 1281, 28 L.Ed.2d 554 (1971). No such showing was made at trial. Accordingly, the learning difficulties of Mexican-American students attributable to defendants' actions must be redressed, and the remaining vestiges of past discrimination must be eradicated.

It may well be that the learning difficulties suffered by Mexican-American children are caused in part by factors other than defendants' intentional discrimination. Any such factors, if proven, would be outside the bounds of plaintiffs' claim and thus beyond the scope of an appropriate remedy. See *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977) *(Dayton I)*. But the harms which have been identified here stem directly from defendants' unconstitutional conduct. It is undisputed that the prejudice openly manifested toward this minority group, its language and culture, throughout most of Texas' history since statehood, has left deep wounds which continue to infect the learning process. That specific cause must be recognized and the resulting harm directly addressed through appropriate remedial action. *Milliken* v. *Bardley (II),* 433 U.S. 267, 282-290, 97 S.Ct. 2749, 2758-2762, 53 L.Ed.2d 745 (1977).[5]

B. The Defendants' Failure to Remedy the Violation

(1) Overview of the State's Remedial Program.

The State of Texas first recognized the need to change its policies in educating Mexican-American children in 1969, when the legislature repealed the 1918 "English Only" law and permitted, for the first time, bilingual education by local school districts "in those situations when such instruction is educationally advantageous to the pupils." Tex.Ed.Code Ann., § 21.109 (Vernon 1970). Four years later, the state legislature enacted the Texas Bilingual Education Act of 1973. Tex.Ed.Code Ann., § 21.451 et seq. (Vernon 1980 supp.). The introductory policy statement of this law stated:

> The legislature finds that there are large numbers of children in the State who come from environments where the primary language is other than English. Experience has shown that public school classes in which instruction is given only in English are often inadequate for the education of children whose native tongue is another language. The legislature believes that a compensatory program of bilingual education can meet the needs of these children and facilitate their integration into the regular school curriculum. . . .

§ 21.451.

The statute required local school districts to determine the number of limited English-speaking students in their district, such students being defined as "children whose native tongue is a language other than English and who have difficulty performing ordinary classwork in English." § 21.452, 21.453(a). School districts with twenty or more of these children in any single language classification in any one grade were required to implement a bilingual education program for their benefit. § 21.453(b). Such a program was required to encompass grades one through six, to be brought to effect in phases, i.e., a grade at a time, beginning with the first grade during the 1974-75 school year. Supplemental state funding was authorized to be paid to school districts operating bilingual programs mandated by this statute. § 21.460.[6]

In 1975, the Texas Legislature amended the 1973 law to reduce the overall scope of required bilingual programs. While adding a provision for bilingual instruction in kindergarten classes, the legislature eliminated mandatory bilingual programs in grades four, five, and six. Bilingual instruction in the fourth and fifth grades was made optional for school districts, with supplemental funding to be provided by the state. No state funds were to be available for bilingual education in grades six through twelve. The amendments enacted in 1975, together with the 1973 Bilingual Education Act, remain in effect, unchanged, to this date.

During the course of this litigation, the State Board of Education approved a new State Plan for Bilingual Education which embodies the provisions of the statute. Gov. Ex. D-13. The plan, adopted on November 11, 1978, contains detailed regulations concerning the identification of limited English-speaking ability students, the components of bilingual programs, and procedures for transferring a child from bilingual instruction into the regular curriculum. The new plan also requires school districts to provide special English language development programs to students in grades one through twelve who have limited English-speaking ability but are not receiving bilingual instruction. Although this plan had not been fully implemented throughout Texas schools by the time this case was tried, it must be treated as the state's current response to its duty to eradicate the vestiges of past discrimination against Mexican-Americans and be evaluated on that basis.

(2) Concept of Bilingual Education and Related Remedial Programs

Both the state's existing education policies toward Mexican-American students and plaintiffs' claims in this action focus on the use of bilingual instruction. An understanding of the concept of bilingual education is a prerequisite to evaluating the programs currently in operation throughout the state. A bilingual education program is defined by Congress in the "Bilingual Education Act," 20 U.S.C.A. § 3221 et seq. (1980 supp.), as:

> a program of instruction, designed for children of limited English proficiency in elementary or secondary schools, in which, with respect to the years of study to which such program is applicable—(i) There is instruction given in, and study of, English and, to the extent necessary to allow a child to achieve competence in the English language, the native language of the child of limited English proficiency, and such instruction is given with appreciation for the cultural heritage of such children, and of other children in American society, and, with respect to elementary and secondary school instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system.

§ 3223(a)(4)(A).

It is stipulated that "[b]ilingual-bicultural education is based on the widely recognized premise that the most effective way to teach children who speak a language other than English, the majority language, is through their mother tongue as a vehicle for instruction."[7] Pl.-Int. Ex. 409, # 1115. If the learning process is initiated in English, a language which the child cannot understand, the child will be likely to fail in his subjects in school and suffer permanent damage to his learning potential. Pl.-Int. Ex. 409, # 909. Providing bilingual instruction to Spanish-speaking children with limited proficiency in English enables them to learn reading, mathematics, and other basic cognitive subjects in a language they comprehend at the same time that their skills in English are being developed.

Dr. Courtney Cazden, Professor of Child Development and Language at Harvard University, articulated the concept more fully: "The theory is a very simple one and straightforward one, that children must be taught in a language that they understand, and that is the only possible kind of equal education." TR 114. Dr. Cazden expressed the view that reading, "the foundation of all future education," must be introduced in the child's native language. TR 115. As she explained:

> [I]f children learn to read in a language that they know, then they are facing one task at that time, namely figuring out the written system; but if a teacher attempts to teach a child to read in an oral language that is not familiar, then the children face the double task of trying to figure out the written system, but even if they figure out and pronounce a word it has no meaning so that is clearly an unequal educational system. TR 119.

While bilingual education in the earliest grades is necessary to provide Mexican-American children with basic learning skills, its importance does not diminish for students of limited English proficiency in the higher grades. As Dr. Cazden further testified:

> [I]t seems to me the situation at the Grade 4 level and beyond is even more serious, first, because the concepts being dealt with in the older grades get progressively more complicated, and therefore, it's harder to understand them if your knowledge of the language of instruction is limited, and secondly, the instruction itself, as you go through the older grades, * * * gets more completely verbal. TR 133.

Concurrence in this opinion came from Dr. Rudolph Troike, a sociolinguist and the former director of the Center for Applied Linguistics. He asserted that "in some respects it's even more critical that they receive instruction in Spanish [in higher grades], since they are already operating at a level where the cognitive content of the instructional material that's being mediated through the language is much heavier than it is at earlier grade levels." TR 205.

Since bilingual instruction is designed to fill an educational vacuum until a particular child is able to function adequately in an all-English classroom, no single fixed duration for an effective bilingual program exists. The time necessary to learn English varies from student to student, founded on a variety of social factors. Gov. Ex. D7 at 83. The parties stipulated that "[t]hree years of bilingual education is inadequate for many students to achieve the level of proficiency needed to compete effectively in English." Pl.-Int. Ex. 409, # 1121.

Most of the experts who testified at trial proposed functional time limits for bilingual programs based upon the particular progress of each student. Dr. John McFarland, Dean of Education at Texas Women's University, suggested that "[a] student who needs help in two languages should have bilingual education until he is comfortable in both languages, can read in both languages with understanding and comprehension and analytically and can write well in both languages." TR 355. Thus, Dr. Cazden proposed that students be given access to sufficient years of bilingual education at any grade level to function effectively in an English language curriculum. TR 172.

The primary alternative to bilingual education for children of limited proficiency in English is the so-called "English as a Second Language" (ESL) program. Children enrolled in ESL programs receive subject matter instruction in English within the regular curriculum. During the course of the school day, these children are taken out of the classroom and given special instruction in the English language. Gov. Ex. B6 at 22. According to Dr. Troike, ESL is essentially a special English class added to the standard school program. TR 202. The principal criticism of ESL as a substitute for bilingual instruction is its failure to provide students speaking foreign languages with meaningful education in cognitive subject areas until after they have learned sufficient English to participate in their regular classes. While a student enrolled in ESL is likely to benefit substantially during the time special English instruction is being provided, the remainder of the school day, spent without comprehension in English-only classes, may be largely wasted. By the time a student's proficiency in English has improved sufficiently to allow for meaningful participation in regular classes, he has fallen far behind his peers.[8]

(3) Effectiveness of Compensatory Bilingual Education

The widespread success of bilingual instruction in meeting the special educational needs of Mexican-American students was amply documented by the evidence presented at trial. Defendants stipulated that the dropout rate for Mexican-Americans in Texas has decreased where bilingual programs have been properly implemented. Pl.-Int. Ex. 409, # 908. A study by the Abernathy Independent School District showed that the test scores of bilingual participants were substantially better than those of a control group of children outside the program. Pl.-Int. Ex. 409, # 1137. James Vasquez, Superintendent of the Edgewood Independent School District, testified that "the attitude of kids toward school has improved tremenduously since the implementation of the bilingual programs in our school—and there is no doubt in my mind that the kids have become more verbal." TR 324. James Lehman, Superintendent of the Eagle Pass Independent School District, reported a "significant growth pattern" at a school in his district attributable to bilingual instruction. TR 405.

These and similar testimonials to the effectiveness of bilingual education in Texas correspond with similar findings made on the national level. Dr. Troike described several recent studies which found that bilingual programs brought Spanish-speaking children "for the first time in recorded history to or above national norms." TR 201. The United States Commission on Civil Rights, in a comprehensive 1975 report, entitled "A Better Chance to Learn," concluded that "bilingual-bicultural education is the program of instruction which currently offers the best vehicle for large numbers of language minority students who experience language difficulty in our schools." Gov. Ex. B7 at 137.

The record in this case demonstrated the particular psychological benefits of bilingual education to children saddled with a history of discrimination. The United States Commission on Civil Rights reported that the use of the child's native language in daily educational programs counteracts feelings of inferiority and contributes to the development of self-esteem essential for educational development. Id. at 35-36.[9] Dr. Cazden explained that "the status of Spanish in the schools as a whole is a very important statement to the child about how he and his culture are seen in the community." TR 180-91. Dr. Rudolph Troike concluded that teaching a Spanish-speaking child exclusively in English communicates a powerful message to the child that he or she is a second-class citizen. TR 203-205.

Giving credence to the extensive and uncontradicted evidence in this case, it is determined that bilingual instruction is uniquely suited, as a vehicle for compensating Mexican-American children in Texas for learning difficulties engendered by pervasive discrimination. Defendants have failed to demonstrate that any alternative medium of instruction would be equally effective.

(4) Detailed Description of the State's Remedial Program.

The utility of bilingual instruction in helping students of limited English proficiency to participate successfully in the regular school curriculum is not in dispute in this case. Texas recognized the vital role played by bilingual instruction in enacting the 1973 Bilingual Education Act. Tex.Ed. Code Ann. § 21.451 et seq. (Vernon 1980 supp.). Defendants have stipulated to the importance of teaching basic cognitive skills in a child's native language. Pl.-Int. Ex. 409, # 909, 1115. The principal issue which divides the parties is whether the specific program designed and implemented by defendants is adequate to eliminate the vestiges of widespread discrimination against Mexican-Americans described above. In order to resolve that issue, a detailed examination of the state's compensatory education programs must be undertaken.

(a) Program Content

As noted above, the state of Texas currently mandates bilingual instruction in kindergarten through third grade for children of limited English proficiency,[10] if at least twenty such students sharing a common native language are at the same grade level within a single school district. On paper, the bilingual program to be accorded those students who qualify contains the basic elements set forth in the federal Bilingual Education Act, 20 U.S.C.A. § 3221, et seq. (1980 supp.), and explicated in the documentary materials received in evidence. The state's bilingual education statute describes the required program as follows:

> (a) The bilingual education program established by a school district shall be a full-time program of instruction (1) in all subjects required by law or by the school district, which shall be given in the native language of the children of limited English speaking ability who are enrolled in the program, and in the English language; (2) in the comprehension, speaking, reading, and writing of the native language of the children of limited English-speaking ability who are enrolled in the program, and in the comprehension, speaking, reading, and writing of the English language; and (3) in the history and culture associated with the native language of the children of limited English-speaking ability who are enrolled

in the program, and in the history and culture of the United States. Tex.Ed.Code Ann. § 21.454 (Vernon 1980 supp.).

Administrative regulations issued by the TEA enumerate the instructional components of the bilingual program:

> (1) The basic concepts initiating the child into the school environment are taught in the language he brings from home.
>
> (2) Language development is provided in the child's dominant language.
>
> (3) Language development is provided in the child's second language.
>
> (4) Subject matter and concepts are taught in the child's dominant language.
>
> (5) Subject matter and concepts are taught in the second language of the child.
>
> (6) Specific attention is given to develop in the child a positive identity with his cultural heritage, self-assurance, and confidence. Pl.-Int. Ex. 383, § 32.52.011.

The state's recently-adopted plan for bilingual education thus requires that substantive instruction be provided in both Spanish (the dominant language) and English (the second language), with the division in time spent on each dependent upon the particular student's relative proficiency in both languages. Gov. Ex. D-13.

Unfortunately, the monitoring conducted by the TEA throughout the state has revealed that these laudable guidelines are frequently ignored by local school districts. A few examples should suffice to demonstrate the wide gap between theory and practice in this field:

- A TEA visit to Lockhart Independent School District in 1975 found that the bilingual program was conducted primarily in English.
- A TEA visit to Aransas Pass Independent School District in 1977 found that no substantive courses within the bilingual program were being taught in Spanish.
- In 1977, the North Forest Independent School District's bilingual program offered no instruction in Spanish language or reading.
- In 1979, the TEA reported that there was no teaching of substantive content in Spanish in the Laredo Independent School District.
- A 1978 TEA monitoring report found very little native language instruction in the Fort Worth Independent School District bilingual program.

Defendants stipulated to the existence of these and similar deficiencies in local bilingual programs in at least twenty-five additional school districts throughout the state. Pl.-Int. Ex. 409, # 801-809, 1207-1234. These districts are failing to provide the minimum level of bilingual instruction required by state law. As a result, many of the state's Mexican-American children entitled to bilingual education are not receiving the compensatory programs they need to keep up with their Anglo counterparts.

(b) Program Coverage

A far more serious weakness in the state's existing bilingual program is the limited scope of its coverage. Bilingual instruction is required only in kindergarten through grade three, and only in those school districts with twenty or more Spanish-speaking students of limited English proficiency in a single grade. Some state funding is provided for optional bilingual instruction in grades four and five. No state assistance of any kind is available for bilingual programs in grades six through twelve which, as a practical matter, precludes any such programs from being offered in the middle and upper grades.

There was considerable dispute at trial over the exact number of limited English proficiency students in the Texas public education system, but all parties agreed that a large number of these children were not being provided with bilingual instruction under current state policy. A report issued by the TEA in 1979 indicated that 198,613 children of limited English proficiency had been identified, statewide, in grades kindergarten through twelve, of whom 89,600 (about forty percent) were not in bilingual programs. Pl.-Int. Ex. 406. Fewer than half of the 19,622 identified children of limited English proficiency in grades four and five (where bilingual instruction is optional) were enrolled in such programs. In grades six through twelve, none of the 64,622 limited English proficiency students identified by TEA were receiving bilingual instruction. In 1975, fifty-seven school districts with a majority of Spanish-speaking, limited English proficiency children in their student populations provided no bilingual instruction, since there were no more than twenty such students in any one grade. Pl.-Int. Ex. 409, # 338.

The number of limited English proficiency students reported by TEA was probably an underestimation, because of the deficiencies in the state's procedures for identifying such children, described in detail below. Figures reported by Dr. J. Michael O'Malley, Senior Research Associate at the National Institute for Education, were considerably higher. On the basis of a recent sampling, Dr. O'Malley estimated that there were 438,000 children in Texas of limited English proficiency between the ages of five and fourteen, inclusive. TR 504. The vast majority of these children are Mexican-American. The state itself projects a Hispanic enrollment in the public schools of 941,875 by 1983-84. If, as Dr. O'Malley suggests, some seventy percent of these children will be limited in English proficiency, approximately 660,000 Mexican-American children will be in need of compensatory education. Projecting forward the fact that approximately forty percent of limited English proficiency students are excluded from bilingual programs under current state policy, it can be estimated that 264,000 limited English proficiency Mexican-American students will be without bilingual instruction within the next three years, unless changes are made.

Defendants maintained at trial that their policy of requiring bilingual instruction in grades kindergarten through three in those districts containing large numbers of Spanish-speaking students, with optional programs at local discretion in grades four and five, was adequate to meet compensatory educational needs. While conceding that bilingual education for all children in all grades would be desirable in an ideal world, defendants pointed to budgetary constraints and limited availability of bilingual staff as necessitating a more modest approach. The state's new bilingual education plan endeavors to pick up the slack by requiring an English language development program to be provided to all limited English proficiency students in the Texas public schools who are not receiving bilingual instruction. Pl.-Int. Ex. 383, §32.52.012.

But the extensive expert testimony offered at trial demonstrated that bilingual education must be provided for children unable to learn in English, until each child is capable of making the transition to a regular, English language classroom, if learning disabilities borne out of pervasive historical discrimination are ever to be overcome. Dr. Cazden, observed: "It is essential that a full plan be available K through twelve for those children who need it." TR 162. Dr. Angel Gonzales, Director of Bilingual Education for the Dallas Independent School District, agreed, TR 275-76, as did Dr. Mary Galvan, Member of a TEA Bilingual Task Force. TR 697. James Lehman, Superintendent of Schools for the Eagle Pass Independent School District, testified to a tremendous need for bilingual education in grades seven through twelve. TR 402. None of this testimony was contradicted or refuted.

The rationale for requiring a bilingual program of some description at all grade levels, as noted above, derives from the fact that the period of time needed to develop sufficient proficiency in English varies from child to child. See supra at 419. Defendants likewise did not dispute the fact. As already stated, they conceded that three years of bilingual instruction, as required by current state law, is inadequate for many students to achieve the level of competence needed to compete effectively in English. Pl.-Int. Ex. 409, # 1121.

Moreover, thousands of limited English proficiency children in the Texas public school system never receive any bilingual instruction whatever. As pointed out by the defendants' own witness, Dr. Robert Tipton of the TEA Division of Bilingual Education, many foreign language-speaking children initially enroll in the Texas public schools at different ages and at different intervals in the school year, depending upon when they first enter the state. TR 1163. Under current state policy, a Mexican-American child with no knowledge of English who enters a Texas school in the sixth or a higher grade is necessarily thrown into an all-English classroom, without the benefit of bilingual instruction. Similarly, limited English proficiency students who happen to reside in smaller school districts, with no more than twenty such students in any single grade, receive no bilingual instruction under existing programs.

The state's attempt to rectify these deficiencies by providing an English language development or ESL program in lieu of bilingual instruction is wholly inadequate. As Dr. Galvan testified, an ESL program is ineffective where it is implemented outside the context of a bilingual program. TR 733-34. As already mentioned, children enrolled in such programs cannot fully comprehend the material being taught in the English language classroom they remain in during most of the school day. During the time they are absent from their regular classroom for special instruction in English, their classmates are moving ahead with substantive instruction. Thus, each day the Mexican-American children participate in this makeshift English language development program, they fall further and further behind their classmates in mathematics, science, social studies, and the other subjects they must master in order to progress. When these students fall so far behind that they cannot compensate for the time lost, or gain upon their peers, they either give up and drop out of school or hopelessly struggle on, effectively disabled by the Texas education system. While the ESL program, examined in a vacuum, might appear to contribute more educational benefit than harm, its incongruity with the remainder of the school curriculum renders it inadequate in meeting the special needs of Mexican-American students at all grade levels of the state's public schools.

(c) Identification of Limited English Proficiency Students

In order to qualify for remedial assistance as described above, a child must first be identified as having limited proficiency in English. Bilingual instruction and ESL are not provided to all Spanish-speaking students, but only to those who are expected to have difficulty learning in an all-English classroom. The accuracy of this initial assessment mechanism is vital to ensuring that special help is provided to those children who need it.

Defendants stipulated at trial that each local school district employs its own procedures to identify children of limited English proficiency. Pl.-Int. Ex. 409, # 213. The methods used are never validated by TEA or any other state agency. Pl.-Int. Ex. 409, # 206. The accuracy of student counts carried out by the local school districts are likewise not verified. Pl.-Int. Ex. 409, # 407, 428; Pl.-Int. Ex. 434 at 25; Gov.Ex. A-7 at 42.

Monitoring reports by TEA indicate that numerous school districts have identified limited English proficiency students solely by the subjective opinions of teachers. Pl.-Int. Ex. 409, # 215, 216, 220, 222, 223. In districts which employ testing mechanisms to measure English language proficiency, Spanish-surnamed students may be the only ones tested. Yet the defendants conceded that Spanish surname is not an accurate indicator for identifying students in need of remedial instruction. Pl.-Int. Ex. 409, # 202. Children are present in Texas schools with Anglo surnames who are, in fact, Spanish-speaking. Gov. Ex. A-9, at 21. It is manifest that such students, who may have limited proficiency in English, should not be overlooked during the identification process.

The new Texas State Plan for Bilingual Education contains guidelines which would improve the accuracy of identifying limited English proficiency students throughout the state. Gov. Ex. D-13. The plan requires that, upon registration for school, all students with foreign surnames receive a "home language" survey, to determine whether the child has a native language other than English. The survey is also to be distributed to other children, based upon staff observation or parental interview. Gov. Ex. D-13 at 1. All students who return a survey form indicating a home language other than English are to be administered an English language proficiency test. The students' scores on that test are compared with fixed standards, to ascertain whether they will be classified as having limited proficiency in English and treated accordingly.

This standardized identification technique, if actually implemented throughout the state, will be far better than the ad hoc, unregulated procedures employed to date. But the method is far from perfect, for all students should be administered a home language survey when they first enter the Texas public schools, to ensure that no foreign language students are overlooked at this key stage. The language proficiency tests approved by TEA under its new plan do not meet commonly accepted standards for educational testing and are not necessarily suitable for use at all grade levels. Def. Ex. 68 at 63, 74-76. Classification of individual students as proficient or not proficient in English varies considerably depending upon the particular test utilized. Def. Ex. 94, Ex. A at 23-24. Moreover, testing alone is often insufficient to measure English proficiency accurately. Some confirmation of test results by teacher observation is needed, before a Spanish-speaking student should be declared ineligible for bilingual instruction or other remedial programs. Def. Ex. 68 at 64-65. Finally, the evidence previously alluded to makes it evident that the identification of limited English proficiency students by local school districts should be verified by TEA through on-site monitoring.

(d) Exit Criteria

One of the principal subjects at issue in this case is the validity of the criteria employed by the defendants for removing students from bilingual programs and reclassifying them for entry into regular classes conducted exclusively in English. Such criteria were adopted pursuant to the State's Bilingual Education Act, which prohibits the transfer of a student out of a bilingual program prior to the third year of enrollment "unless the parents of the child approve the transfer in writing and unless the child has received a score on an examination which, in the determination of the agency, reflects a level of English skills appropriate to his or her grade level." Tex. Ed.Code Ann. § 21.455 (Vernon 1980 supp.).

Since bilingual education in Texas is a transitional program, designed to provide students with the tools they need to function effectively in a classroom taught only in English, some threshold criteria for making that shift must be established. The parties disagree over what particular level of proficiency in English must be reached before a child no longer needs bilingual instruction or other remedial assistance. In 1976, the TEA issued a memorandum stating that transfer from a bilingual program would be permitted only if a student received a composite score at or above the fortieth percentile on the language arts and reading sections of an approved standardized achievement test.[11] Pl.-Int. Ex. 260. The memorandum specified that:

> The 40th percentile [was] chosen because the Texas Education Agency [felt] that a child whose primary language is other than English should be able to demonstrate English proficiency to an extent that his integration into and participation in the regular school program will in no way be jeopardized by a deficiency in English language skills.

Id. But the revised state plan, approved less than three years later, sharply reduced the level of proficiency which justifies reclassification. Under current TEA regulations, a student can be withdrawn from a bilingual program and transferred into an all-English classroom as soon as the student achieves a score at the twenty-third percentile or higher in reading and language arts on an approved test. Gov. Ex. D-13 at 13. Thus, even if three-fourths of the nation's students perform better than a particular Mexican-American child in these subjects, that child is now deemed by the state to be adequately equipped to learn effectively without remedial help in an English language classroom. Moreover, there is no indication that the relative abilities of each particular student in Spanish and English are compared during the reclassification process.

The testimony of expert witnesses was harshly critical of the twenty-third percent threshold. James Lehman, Superintendent of Schools in the Eagle Pass Independent School District, observed: "I would have to say that a student scoring at the 23rd precentile within Eagle Pass Independent School District would probably be identified as a student requiring additional remedial assistance, not a student who is capable of being able to hold his own and be able to achieve academically." TR 406. Dr. Robert Cervantes, Assistant Chief of the Office of Bilingual Education for the State of California, described the level as "ludicrous," adding that students scoring at the twenty-third percentile were "functionally illiterate." TR 560. Dr. Jose Cardenas, one of the nation's leading experts in the field of bilingual education, called the twenty-third percent level "insultingly low." TR 766, Dr. Mary Galvan referred to the criterion as "wholly inadequate." TR 694. That evaluation was shared by Angel Gonzales, Director of Bilingual Education for the Dallas Independent School District. TR 225. Dr. John McFarland, Dean of Education at Texas Women's University, noted: "A person functioning at the 23rd percentile would be ineffective in our society in salesmanship, in merchandising, or in any profession or in seeking opportunities or, indeed, might be handicapped in his interpersonal relationship with others." TR 357.

There is no doubt that the current state regulations, which tie reclassification solely to an achievement test score of twenty-third percentile or higher, are wholly inadequate to meet the needs of the state's Mexican-American children. That figure is arbitrary and unjustifiably low. A state policy which takes children in need of remedial programs out of those very programs satisfies no legitimate purpose. Once a child has been identified as limited in English proficiency, it appears logical that the presumption should obtain that remedial help is required until there is persuasive evidence that the child is indeed ready to move into an all-English classroom.

As one expert witness explained, the criteria for exit should err on the side of leaving some students in bilingual programs longer than absolutely necessary, rather than removing some prematurely. In this connection, Dr. Martin Gerry, former Director of the Office of Civil Rights at the Department of Health, Education and Welfare, testified: "It doesn't hurt a child to receive specialized intensive services even beyond some point in time when you could argue that the child doesn't need it, but it devastates a child to be taken out of a program of specialized intensive services when the child does need it." TR 948.

While maintaining that the test score threshold is set too low to signify actual proficiency in English, many of the expert witnesses who testified also criticized the defendants' exclusive reliance upon standardized written test results to resolve whether a child was ready to move into an all-English classroom. Oral speaking ability, essential to effective class participation, is not measured by the TEA-approved tests. TR 407. The defendants' own witness, Dr. Robert Tipton of TEA, conceded that oral speaking ability will not correlate with achievement test scores as a matter of course. TR 1258. Thus, current state exit criteria fail to address the child's ability to function fully in an English-speaking class.

The preponderance of expert testimony, including that offered by defendants, indicated that exit criteria should be multi-faceted in nature, to ensure that a student is not prematurely excluded from a bilingual program which may be essential for educational success. Dr. Cardenas suggested that the achievement test score, oral proficiency, teacher judgment, and parental viewpoint should all be taken into account in making a decision to reclassify a limited English proficiency child. TR 1126-27. Dr. Tipton recommended that the mastery of specific skills, reflecting all facets of the learning process, replace test scores altogether as exit criteria. TR 1203.

In sum, the record demonstrates that the state's exclusive reliance upon English achievement test scores for the purpose of reclassifying students out of bilingual programs is erroneous. All of the testimony indicated that oral speaking ability and other cognitive skills must be taken into account as well. Moreover, the relative abilities of a student in Spanish and English are relevant to determining whether that student can achieve his learning potential in an English-only classroom. Multi-faceted criteria should be developed to carry out this important task of reclassification in an accurate and responsible manner.

(e) Monitoring and Enforcement

The inadequacies of the state's bilingual program, described above, are compounded by the defendants' failure to monitor and enforce local compliance with state regulations in this field. Primary reponsibility for state administration of bilingual education rests with TEA's Division of Bilingual Education. The myriad duties of this division include advising school districts concerning the development and implementation of local programs, reviewing local proposals for Title VI grants, reviewing all applications for state bilingual funding, and monitoring local compliance with state law. The division currently employs ten professionals and two secretaries to carry out these tasks, with respect to approximately 1,100 school districts throughout the state. No increase in personnel or resources is contemplated by TEA. Pl.-Int. Ex. 409, # 401, 404.

It is clear that the staffing of the Bilingual Education Division is grossly inadequate to accomplish all of its responsibilities. By its own estimate, the division could not fulfill its basic duties, even with an increase in personnel of fifty percent. Pl.-Int. Ex. 409, # 444. Attributable in part to this severe staffing constraint, the division has concentrated on providing technical assistance to school districts, rather than monitoring compliance with state law. Gov. Ex. A-7 at 52.

The Division of Bilingual Education does, however, accomplish on-site visits of selected school districts to evaluate their bilingual programs. Up to the time of trial, monitoring had been limited to those districts reporting a sufficient number of limited English proficiency students to necessitate bilingual instruction. By undercounting such students—and failing to establish a bilingual program to meet their needs—a local school district could thus effectively avoid compliance review.

The principal tool used in conducting these visits is TEA's *Guide for Monitoring Visit*, a publication which defendants admit is inadequate for its intended purpose. Pl.-Int. Ex. 409, # 461, 452. Following a monitoring visit, the division sends a report of its findings to the school district, specifying any criticisms or weaknesses in the district's program. But the division does not threaten or impose sanctions for non-compliance, nor has it ever recommended to the Division of School Accreditation that sanctions be imposed. Pl.-Int. Ex. 409, # 417.

The Division of School Accreditation is the second principal actor in the defendants' enforcement program. That division has the power to impose sanctions, up to and including loss of state accreditation, upon local districts which violate state education laws and regulations. The record indicates that this division has not treated the state's Bilingual Education Act as worthy of strict enforcement. Despite serious deficiencies and violations of law found in the bilingual programs of numerous local districts and reported to the Division of School Accreditation, no warnings or sanctions of any kind have been imposed. Pl.-Ent. Ex. 409, # 441. Similarly, no school district in Texas has ever faced a loss of accreditation for failing to provide bilingual education altogether. Id., # 403.

In keeping with its lax enforcement policies in this area, TEA significantly diluted formal accreditation standards regarding bilingual education in 1977. The original bilingual guidelines, which were embodied in the accreditation standards, set forth specific program requirements which included program content and teaching methodology. Pl.-Int. Ex. 68 at 19. But three years later, the agency rewrote Principle VI, Standard 8, in the following vague terms: "A district enrolling pupil populations requiring compensatory programs discharges those obligations by adaptations of the curriculum to fit distinctive needs (such as language or culture) of these populations." Pl.-Int. Ex. 409, #407 (a), 408(a); Pl.-Int. Ex. 69 at 23.

The new state plan for bilingual education does address some of the deficiencies of TEA's compliance program. The plan provides for on-site visits to school districts without bilingual programs, as well as to those districts where such programs do exist. Pl.-Int. Ex. 383, § 32.52.050. The plan further provides that the Division of Bilingual Education shall report the findings of its monitoring visits to the Division of School Accreditation. Id. But unless some appropriate division within TEA undertakes on-site verification of student counts reported by districts without bilingual programs, visiting such districts is largely an empty gesture. Moreover, no indication is present that the Division of School Accreditation will give any more emphasis to information concerning shortcomings in the area of bilingual education than it has in the past. Finally, while augmenting the monitoring duties of the Bilingual Education Division may appear hypothetically impressive, these new responsibilities cannot, in reality, be effectively undertaken by the same tiny staff unable to complete a more modest set of tasks up to the present. Unless the defendants are prepared to commit substantial additional resources to this effort, monitoring of bilingual education at the local level will continue to be deficient.

(5) Conclusion

The state's compensatory education program has not succeeded in eradicating the disabling effects of pervasive historical discrimination suffered by Mexican-Americans in the field of education. Bilingual instruction is uniquely suited to remedying the special learning problems of these children and preparing them to enjoy equal educational opportunity in the Texas public schools. The state's existing bilingual program, while an improvement over past practices, is wholly inadequate.

Serious flaws permeate every aspect of the state's effort. Required program content, described in detail by state law and regulation, is frequently ignored by local school districts. The scanty coverage of the state's bilingual program leaves tens of thousands of Mexican-American children without the compensatory help they require to function effectively as students. Identification of limited English proficiency students by local school districts is unreliable and unverified. Criteria for transferring students out of bilingual programs and into all-English classrooms are fixed far too low to ensure that all vestiges of discrimination have been removed before relief is cut off. Finally, the state has failed to monitor local bilingual programs in a thorough and diligent manner or to enforce applicable laws and regulations through the imposition of sanctions in appropriate circumstances. Since the defendants have not remedied these serious deficiencies, meaningful relief for the victims of unlawful discrimination must be instituted by court decree.

III. TITLE VI CLAIM

In addition to their constitutional claims based upon de jure discrimination against Mexican-Americans in Texas, plaintiffs contend that they are entitled to relief under two separate federal statutes.[12] The first such statute, section 601, of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d, prohibits discrimination in any program receiving federal funds.[13] The crux of the statutory claim is that the defendants' failure to provide adequate educational programs to remedy the special learning difficulties of these children constitutes, in itself, unlawful discrimination based on national origin. For the reasons set forth below, plaintiffs have not prevailed on this cause of action.

Plaintiffs' Title VI allegations parallel the claim upheld by the Supreme Court in *Lau* v. *Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). *Lau* was a class action brought on behalf of non-English speaking Chinese students in San Francisco. Plaintiffs claimed that the failure of the city's public school system to educate these children in a language they could understand constituted discrimination in violation of both Title VI and the Equal Protection Clause of the Fourteenth Amendment. In a brief opinion, limited to the statutory claim, the Court declared that providing the same all-English instruction and materials to students who speak English and to those who did not constituted inequality of educational opportunity, since the latter "are effectively foreclosed from any meaningful education." Id. at 566, 94 S.Ct. at 788. Relying upon regulations of the Department of Health, Education and Welfare which were drawn up to interpret and administer Title VI, the Court found that "discrimination is barred [under the statute] which has that *effect* [discrimination], even though no purposeful design is present." Id. at 569, 94 S.Ct. at 789 (emphasis in original). Once unlawful discrimination had been established, the regulations required that school authorities take affirmative action to rectify the language barrier impeding these students. The Court remanded the case for a determination of the proper remedy in accordance with those regulations.

The apparent significance of *Lau* to the case at bar is clear. First, *Lau* demonstrated the Supreme Court's concern with language barriers linked to ethnicity and its awareness that such barriers, unless overcome, effectively preclude educational opportunity. Second, *Lau* recognized an affirmative obligation on the part of school officials to take steps to meet this problem head-on. Third, and most importantly, *Lau* was predicated on the Court's stated assumption that only discriminatory effect was necessary to establish unlawful action under Title VI. Discriminatory purpose or intent, under that view, need not be demonstrated as an essential element of the statutory violation.

It is on this final point that plaintiffs' Title VI claim founders in this case. In 1976, two years after it decided *Lau*, the Supreme Court held that an allegation of discriminatory purpose, in addition to discriminatory impact, was necessary to state a cause of action under the Fourteenth Amendment. *Washington* v. *Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597. According to this newly-evolved doctrine, "[e]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979).

The infusion of an intent requirement into the constitutional cause of action did not necessarily alter the parameters of Title VI. Congress is empowered to proscribe discriminatory conduct which the Constitution does not reach, as it has, for example, in enacting Title VII, which imposed duties on private employers beyond the scope of the Fifth and Fourteenth Amendments. But in the case of *University of California Regents* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), a majority of the Court, in separate opinions, addressed the relationship between Title VI and the Equal Protection Clause and found them to be essentially coextensive.

Four members of the Court, in an opinion written by Justice Brennan, undertook an extensive analysis of the legislative history of Title VI. They concluded that "Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a state or its agencies. . . ." Id. at 328, 98 S.Ct. at 2767. The purpose of the statute, these justices found, was not to expand the concept of discrimination under the law, but rather to extend the existing requirements of the Fourteenth Amendment to private programs that receive federal funds. Id. at 327-29, 98 S.Ct. at 2767-68.

Justice Brennan and his colleagues were well aware that their views concerning Title VI, when read in conjunction with *Washington* v. *Davis* and its progeny, undercut the doctrine set forth in *Lau*, i.e., that impact alone was sufficient to make out a statutory violation. Their analysis was expressed in the following passage:

> We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington* v. *Davis*, 426 U.S. 229 [96 S.Ct. 2040, 48 L.Ed.2d 597] (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. Id. at 352, 98 S.Ct. at 2779.

The four justices nevertheless concluded that "Title VI's definition of racial discrimination is absolutely coextensive with the Constitution. . . ." Id.

This view was shared by a fifth member of the Court, Justice Powell, who also reviewed legislative history and declared: "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." Id. at 287, 98 S.Ct. at 2746. The four remaining justices, speaking through Justice Stevens, found it unnecessary to decide the congruence, or the lack thereof, between Title VI and the Fourteenth Amendment in order to decide the case. Id. at 417-18, 98 S.Ct. at 2813.

The United States, recognizing the implications of *Bakke* for its *Lau*-based statutory claim in this case, has attempted to distinguish those two cases in a manner which would justify the conclusion that the majority of justices did not accurately express what they mean to signify. Relying upon a description of *Lau* offered by Justice Powell, the Government asserts that Title VI is coextensive with the Fourteenth Amendment in some circumstances (i.e., *Bakke*) but not in others (i.e., *Lau*). It is quite true that the affirmative action disallowed in *Bakke* was substantially different from the affirmative action mandated in *Lau*. But the majority's finding of coextensiveness, based upon overwhelming evidence of congressional intent, did not depend upon the details of each alleged act of discrimination. Either Congress went beyond the constitutional notion of unlawful discrimination in enacting Title VI or it did not. A majority of the Supreme Court has concluded that it did not.

Thus, while *Bakke* does not expressly overrule *Lau*, it renders that decision obsolete, insofar as it found a violation of Title VI merely on proof of discriminatory impact without any showing of discriminatory intent, as required by *Washington* v. *Davis* and subsequent cases. If Title VI is coextensive with the Equal Protection Clause, purposeful discrimination must be shown to make out a statutory violation.[16] Thus it must be decided whether that required has been met by plaintiffs here.

Proof of discriminatory intent necessitates a showing that the defendants acted as they did for the purpose, in whole or in part, of mistreating or relegating members of a particular racial or ethnic group to an inferior position. In this case, the State of Texas and its educational agencies have taken certain steps, for the purpose of alleviating language barriers which pose an obstacle to the education of Spanish-speaking children. While these actions have been inadequate to meet the problem, it has not been suggested that they were instituted for an invidious purpose.

It is unquestionable that the defendants' refusal to provide bilingual instruction at all grade levels for all children of limited English proficiency has effected a disproportionate impact upon the state's Mexican-American ethnic minority. But there is no evidence that the state's recent policies, isolated from the long history of purposeful discrimination, were themselves designed with the intent of perpetuating that discrimination. The state's existing program of remedial instruction for these disadvantaged children may be inadequate, but it is not, in itself, discriminatory. In the absence of purposeful discrimination, the state's failure to provide comprehensive bilingual instruction for all Mexican-American students who need it does not, apart from the past de jure discrimination suffered by that ethnic group, constitute an independent violation of the Equal Protection Clause. Since Title VI has now been deemed coextensive with the Fourteenth Amendment, neither has there been a violation of that statute.

IV. EQUAL EDUCATIONAL OPPORTUNITIES CLAIM

The second statutory basis of plaintiffs' claim for relief is § 204(f) of the

Equal Educational Opportunities Act of 1974 (E.E.O.A.), codified at 20 U.S.C. § 1703(f). The E.E.O.A., enacted as Title II of the Education Amendments of 1974, was originally proposed by the President in 1972, when it passed the House but not the Senate. Two years later, the E.E.O.A. was adopted as a floor amendment to the omnibus Education Amendments legislation in both houses of the Congress and signed into law. Section 1703 of the statute prohibits a state from denying equal educational opportunity in any of six specified ways, including

> the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program. § 1703(f).

Plaintiffs contend that the defendants' existing educational program, which has failed to overcome the language barrier faced by Mexican-American children, violates this provision of law.

In assessing the validity of that claim, it is necessary, first, to address the same questions discussed above—the relationship of the E.E.O.A. to the Fourteenth Amendment. If § 1703 merely restates the requirements of the Equal Protection Clause, without creating new forms of prohibited conduct, the entire body of Fourteenth Amendment law, including the intent requirement set forth in *Washington* v. *Davis,* should presumably be read into the statute. But if the E.E.O.A., like Title VII, was designed to proscribe discriminatory action outside the scope of the constitutional prohibition, it must be accorded a separate interpretation on the basis of its own language and legislative history.

The evolution of the E.E.O.A. makes it clear that the statute was intended to create new substantive rights for victims of discrimination, beyond that subject to challenge on constitutional grounds. The House Committee on Education and Labor, which approved the legislation in 1972, reported:

> [t]he committee bill for the first time in Federal Law contains an illustrative definition of denial of equal educational opportunity. It is the purpose of that definition. . . to provide school and governmental authorities with a clear delineation of their responsibilities to their students and employees with the means to achieve enforcement of their rights. H.R.Rep. No. 1335, 92nd Cong., 2nd Sess. at 3 (1972).

The presidential message which proposed the legislation specifically emphasized its establishment of enforceable rights for school children of limited English proficiency:

> School authorities must take appropriate action to overcome whatever language barriers might exist, in order to enable all students to participate equally in educational programs. This would establish, in effect, an educational bill of rights for Mexican-Americans, Puerto Ricans, Indians, and others who start under language handicaps, and ensure at last that they too would have equal opportunity. 118 *Congressional Record* 8931 (1972).

The Court of Appeals for the Fifth Circuit has recognized that the E.E.O.A. in general and section 1703(f) in particular encompass forms of conduct not within the purview of the Equal Protection Clause. In *United States* v. *Hinds County School Board,* 560 F.2d 619 (1977), the Court of Appeals expressly rejected the defendant's assertion that the legislation merely restates existing constitutional law and, to the contrary, held:

> The sections go beyond the acts and practices proscribed prior to the Equal Education Opportunities Act's passage and guarantee additional rights to public school children. Id. at 624.

In *Morales* v. *Shannon,* 5 Cir., 516 F.2d 411, 415 (1975), cert. denied 423 U.S. 1034, 96 S.Ct. 566, 46 L.Ed. 2d 408 (1976), a desegregation case brought on behalf of Mexican-American children in Uvalde, Texas, the court observed:

> It is now an unlawful educational practice to fail to take appropriate action to overcome language barriers.

Section 1703(f) was cited as authority for this statement of law.

The above analysis demonstrates that the E.E.O.A., in contrast to Title VI, is not coextensive with the Fourteenth Amendment. The question of whether or not discriminatory intent is a necessary element of a § 1703(f) violation must therefore be resolved, not by reference to constitutional doctrine, but by the text of the statute itself. The language and structure of § 1703 provide a clear answer. Six different means by which equal educational opportunity may be denied are enumerated. Several of these forbidden forms of conduct, as described in the subsections of § 1703, expressly include an element of intent. Sections 1703(a) and (b) address instances of "deliberate segregation," while § 1703(e) prohibits student transfers "if the purpose and effect of such transfer is to increase segregation. . . ."

In contrast, other subsections of § 1703 contain no requirement of intent in describing prohibited conduct. Section 1703(c) is concerned with all student assignments which have the *effect* of increasing segregation. Similarly, § 1703(f), the provision at issue here, says nothing about purpose. Thus, the subsection applies to any failure by any educational agency to overcome language barriers, regardless of how the barrier originated or why the agency has neglected to take corrective measures.

Plaintiffs allege that defendants have failed to take appropriate remedial action to meet the language difficulties encountered by Spanish-speaking students in the public schools. That allegation falls directly within the terms of § 1703(f). Hence, no proof of invidious intent need be presented. Congress has determined that a school system which fails to overcome language barriers that handicap its students denies them equal educational opportunity. If plaintiffs can demonstrate such failure, whether deliberate or unintentional in nature, they are entitled to relief.

One remaining question in deciding whether a violation of the E.E.O.A. has taken place lies in the meaning of the phrase "appropriate action" in § 1703(f). If the statute requires only that school officials take some steps to address the problem posed by language barriers, that requirement has certainly been met by defendants here. They have instituted a plan, described above, consisting of bilingual instruction for some students and English development classwork for others. While the deficiencies of that program are manifest, it is, nevertheless, a program of action undertaken to meet the perceived need.

But it would make little sense to conclude that Congress, after identifying a serious problem in the nation's schools and requiring affirmative measures to overcome it, would permit any course of conduct, however ineffectual or counterproductive, to satisfy its mandate. Congress was obviously concerned with the implementation of effective solutions to learning barriers caused by language differences, not with forcing school officials to go through the motions of responding to the statutory mandate without achieving meaningful results. The term "appropriate action" must necessarily include only those measures which will actually overcome the problem. Substantive results, not form, are necessarily dispositive in assessing a school district's compliance with the law.

In two recent cases involving claims relating to bilingual instruction, this interpretation was accorded §1703(f) by the United States District Court for the Eastern District of New York. *Rios* v. *Read,* 480 F.Supp. 14 (1978); *Cintron* v. *Brentwood Union Free School District,* D.C., 455 F.Supp. 57 (1978). In each case, it was found that the school district's programs, while well-intended, were inadequate; and it was concluded and ordered that more effective programs should be instituted to meet the requirements of the statute. See also *Rios* v. *Read*, 73 F.R.D. 589, 596 (E.D.N.Y. 1977) (discussing these issues in pretrial context). Plaintiffs contend for a similar finding in the case at bar.

One court addressing a claim brought under this statute found that "appropriate action" under §1703(f) need not include bilingual instruction. *Guadalupe Org. Inc.* v. *Temple Elem. School*, 587 F.2d 1022, 1030 (9th Cir. 1978). There, the Court of Appeals for the Ninth Circuit upheld a local district's remedial plan against a challenge brought on behalf of Spanish-speaking children. But plaintiffs in *Guadalupe*, in sharp contrast to plaintiffs here, conceded that the plan already in place was adequate to enable the students to participate fully in the educational process. Id. at 1028-29. They sought bilingual instruction, not as a transitional device to prepare children to enter an all-English classroom, but as a permanent educational end in itself.

It is true that bilingual instruction per se is not required by § 1703(f) or any other provision of law. If the defendants here had implemented another type of program which effectively overcame the language barriers of Mexican-American students and enabled them to participate equally in the school curriculum, without using bilingual instruction of any kind, such a course would constitute "appropriate action" and preclude statutory relief. But the evidence in this case, discussed above, showed that the defendants have failed to remedy this serious educational problem as it exists throughout the State of Texas. A violation of § 1703(f) has thus occurred. The evidence also demonstrated that bilingual instruction is uniquely suited to meet the needs of the state's Spanish-speaking students. Therefore, the defendants will be required to take further steps, including additional bilingual instruction, if needed, to satisfy their affirmative obligation under the statute and enforce the right of these linguistically deprived children to equal educational opportunity.

A separate violation of the E.E.O.A. by the defendants stems directly from their failure to remove the disabling vestiges of past de jure discrimination against Mexican-Americans as found in section II, supra. Under § 1703(b) of the E.E.O.A., equal educational opportunity is denied where an educational agency which has formerly practiced deliberate segregation of students on the basis of race, color, or national origin fails to take "affirmative steps" to remove the vestiges of that discrimination. As in the case of "appropriate action" under § 1703(f), the affirmative steps required by §1703(b) are necessarily those measures which accomplish the objective of completely extirpating discrimination. The myriad deficiencies of the defendants' existing educational program for Mexican-American students make out a statutory offense under § 1703(b), as well as a violation of the Equal Protection Clause.

V. RELIEF

The lingering residue of unconstitutional discrimination suffered by Mexican-Americans in Texas and the continued existence of language barriers which impede equal educational opportunity can no longer be tolerated. The defendants make much of their efforts to meet these inequities and bring Mexican-American children into the educational mainstream. It is true that the state's existing policies toward these children constitute a significant improvement over past de jure discriminatory practices and are no doubt motivated by the best of intentions. But good intentions are not enough. The measure of a remedy is its effectiveness, not its purpose. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979)

(*Dayton II*). The Court of Appeals for the Fifth Circuit succinctly expressed this proposition:

> As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. *United States* v. *Jefferson Cty. Bd. of Ed.*, 372 F.2d 836, 894 (1966), cert. denied 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967).

The task of enabling all Mexican-American children in Texas to overcome past discrimination and enjoy full participation in the state's public education system cannot be delayed until the defendants voluntarily overcome their reluctance to provide the necessary programs. Constitutional rights are to be promptly vindicated. *Watson* v. *Memphis*, 373 U.S. 526, 539, 83 S.Ct. 1314, 1321, 10 L.Ed.2d 529 (1963). Justice Goldberg's words in *Watson*, on behalf of a unanimous Court, in rejecting the defendants' desire to delay complete desegregation of public recreation facilities, are equally applicable to the case at bar:

> The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelming compelling reason, they are to be promptly fulfilled. Id. at 533, 83 S.Ct. at 1318 (emphasis in original).

No justification exists to postpone meaningful relief for the many thousands of Mexican-American children whose very futures in this society depend upon the effectiveness of their education. Remedying past injustices suffered by an ethnic minority may be politically inexpedient and economically burdensome; but citizens cannot be compelled to forego their constitutional rights because public officials fear public hostility or desire to save money. *Palmer* v. *Thompson*, 403 U.S. 217, 226, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438 (1971).

In a case such as this, where constitutional and statutory claims of a serious and extensive nature have been upheld, the court hearing those claims has no choice. Its clear and compelling duty is to frame a decree which will work immediately to eliminate the discriminatory effects of the past and to assure future compliance with the laws of the land. *Green* v. *County School Board*, 391 U.S. 430, 438 n. 4, 88 S.Ct. 1689, 1694 n. 4, 20 L.Ed.2d 716 (1968); *United States* v. *DeSoto Parish School Board*, 574 F.2d 804, 811 (5th Cir. 1978), cert. denied 439 U.S. 982, 99 S.Ct. 571, 58 L.Ed.2d 653 (1978). Waiting is not the perogative of a federal court. It must act swiftly in the face of constitutional denial as it occurs. *United States* v. *Texas Education Agency*, 467 F.2d 848, 891 (5th Cir. 1972) (en banc) (Brown, C.J., separate opinion).

A. Principles of Equitable Relief

In fashioning and effectuating relief from unconstitutional de jure discrimination, a court must be guided by basic equitable principles. *Brown* v. *Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955) (*Brown II*). Foremost among these principles is the breadth and flexibility characteristic of equity as a vehicle for ensuring an effective remedy for past wrongs. *Swann* v. *Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971). The purpose of equitable relief is to adapt judicial power to the particular set of circumstances before the court. *Alabama* v. *United States*, 304 F.2d 583, 591 (5th Cir. 1963), aff'd., mem., 371 U.S. 37, 83 S.Ct. 145, L.Ed.2d 112 (1962).

Rather than merely prohibiting the continuation of unlawful conduct, an equitable decree may be affirmative in nature, compelling defendants to take corrective or remedial action necessary to offset the harmful effects of such conduct. Id. at 590; see also *United States* v. *Texas*, 342 F.Supp. 24 (E.D.Tex.1971), aff'd. 466

F.2d 518 (5th Cir. 1972) (per curiam) (ordering bilingual-bicultural instruction in the public schools of San Felipe Del Rio Consolidated Independent School District, to remedy de jure discrimination against Mexican-American students). State governments are not immune from such injunctions under the Tenth Amendment, since that general reservation of nondelegated powers to the states has no bearing upon the enforcement of express prohibitions contained in the Equal Protection Clause of the Fourteenth Amendment. *Milliken* v. *Bradley*, 433 U.S. 267, 291, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977) *(Milliken II)*. Moreover, affirmative equitable relief may be ordered, notwithstanding a direct and substantial impact upon a state's treasury, as long as the relief is designed to operate prospectively rather than as retroactive money damages. Id. at 289, 97 S.Ct. at 2761; *Gary W.* v. *State of Louisiana*, 601 F.2d 240, 246 (5th Cir. 1979).

In order to fulfill its basic purposes, equitable relief must be carefully tailored to the violation which has been found. A court must do more than merely identify victims of unlawful discrimination and take action to assist those individuals. Instead, the remedy invoked must discretely remedy the specific consequences of the defendants' illegal actions. In instances of pervasive, systemwide discrimination, it is the combined effect of all violations which must be addressed by the remedy, even if they may have been distinct and divisible in nature. *Evans* v. *Buchanan*, 582 F.2d 750, 751, 764 (3rd Cir. 1978) (en banc), aff'd. 446 U.S. 923, 100 S.Ct. 1862, 64 L.Ed.2d 278 (1980). In recapitulation, the scope of the injury determines the substance and extent of the appropriate remedy. *Swann*, 402 U.S. at 16, 91 S.Ct. at 1276.

Defendants here have conceded that their past discriminatory policies toward Mexican-Americans have contributed significantly to the learning difficulties still experienced by members of that minority group in the Texas public schools. The record summarized in Section II, supra, graphically demonstrates the pervasiveness of that discrimination and the severity of the language-based educational deficiencies which are its legacy. All of the circumstances which may have led to the plight of Mexican-American children in public schools throughout the state cannot be rectified here. Such relief is not only beyond the scope of this litigation, but also beyond the capabilities of the law. A duty exists, however, to address that specific cause of the current injury which stems directly from defendants' past unconstitutional conduct. Since the defendants formerly vilified the language, culture, and heritage of these children with grievous results, effectual measures must be implemented to counteract the impact of that pattern of discrimination.

In formulating an effective remedy, the hidden vestiges of discrimination, as well as its more visible symptoms, must be attacked. Courts have become increasingly sensitive to the ancillary effects of long-standing prejudice and the need to provide concomitant relief. This issue was faced squarely by the Supreme Court in *Milliken* v. *Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) *(Milliken II)*. In *Milliken*, the district court had ordered that remedial education programs be provided to Black students, as part of an equitable decree, grounded upon a finding of de jure discrimination in the Detroit public schools. Addressing the propriety of such affirmative relief, the Court noted:

> In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a long-standing segregated system. Id. at 283, 97 S.Ct. at 2758.

The Court found that the remedial programs ordered by the district court were aptly tailored to relieve the consequences of defendants' unlawful conduct and, further, that they would serve to help restore the victims of discrimination to the position they would have enjoyed in terms of education had equal instruction been continuously provided to all children in integrated schools. Id. at 282–88, 97 S.Ct. at 2758–61. An affirmative response to the ancillary effects of discrimination, approved by the Supreme Court in *Milliken II*, is equally appropriate in the case at bar.[15]

B. The Appropriate Remedy

As noted in Section II, supra, the defendants' program to remedy the learning difficulties experienced by Mexican-American children as a result of past discrimination has been sorely deficient. Bilingual instruction has been made unavailable to tens of thousands of limited English proficiency students, at all grade levels, in need of such a learning tool. Procedures for identifying children requiring remedial assistance are unreliable. The criteria employed to transfer students out of bilingual programs serve to push many Mexican-American children into all-English classrooms long before they are able to participate effectively in such an environment. English language development programs, widely used in lieu of bilingual instruction, neglect meaningful instruction in cognitive subject areas while they are seeking to improve proficiency in English. Monitoring of remedial programs at the local level is lax, and enforcement of applicable state regulations remains virtually nonexistent.

The state's response to this poor record of achievement is essentially its contention that it is doing all in its power with the resources it has available. The state's existing program, unquestionably is better than nothing. But the implementation of incomplete remedies to meet widespread constitutional violations has been consistently disapproved. Thus, for example, in *Lee* v. *Macon County Board of Education*, 5 Cir., 616 F.2d 805 (1980), and *Arvizu* v. *Waco Independent School District*, 5 Cir., 495 F.2d 499 (1974), the Court of Appeals for the Fifth Circuit rejected local desegregation plans which failed to cover all public school grades. See also *United States* v. *Texas Education Agency*, 564 F.2d 162, 175 (5th Cir. 1977), cert. denied 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979) (*Austin III*).

The state's institution of a limited bilingual education program restricted to the lower primary grades is analogous to the partial desegregation plans disapproved in these and other cases. Since all Mexican-American children in Texas public schools bear the burden of historical discrimination, all in need of remedial bilingual instruction are equally entitled to receive such relief, regardless of their grade level. It is not sufficient for the state to meet the special needs of these children in lower grades and thereafter leave them to fend for themselves in all-English classrooms which these students are not prepared to enter.

In justifying their failure to provide a more extensive program of bilingual education, the defendants contend that there are simply not enough qualified bilingual teachers available to staff such a program. But they concede that the state has made inadequate efforts to train administrators in bilingual education. Pl.-Int. Ex. 409, # 821. Defendants further acknowledge that there are presently at least 263 teachers in Texas who have bilingual certification who are not being utilized in bilingual programs, which constitutes a substantial untapped pool of talent. Pl.-Int. Ex. 409, #501.

More importantly, the available supply of teachers trained in bilingual instruction is not static, but constantly changing. It responds to a number of variables, including the existence of recruitment programs and the strength of overall demand. Dr. Norma Hernandez, Dean of the College of Education at the University of Texas at El Paso, testified that the number of teaching students in her school who would seek bilingual training would increase substantially, if there were a firm state commitment to providing bilingual education in the Texas public schools at all grade levels. TR 617. Yet the only signals given by the state with respect to the scope of bilingual education since 1973 have been to the contrary. In 1975, required bilingual instruction was cut back from grades one through five to kindergarten through three. Bilingual exit criteria were weakened in 1979. With respect to recruitment, the Department of HEW's Office of Civil Rights found that TEA has no plan or program to recruit and hire qualified bilingual personnel. Thus, any temporary shortage of available bilingual teachers is partially of the defendants' own making.[16]

A similar objection to court-ordered bilingual instruction was raised by the defendants in *Serna* v. *Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.M. 1972), aff'd 499 F.2d 1147 (10th Cir. 1974). Responding to the alleged unavailability of qualified bilingual teachers, the court noted:

> This is not an acceptable justification for not providing specialized programs where the deprivation of them violates a constitutional right . . . .Id. at 1283.

While the defendants may have practical problems to overcome in order to provide complete and effective relief to victims of past discrimination, their duty to do so is clear and compelling.

Several other courts have faced the propriety of ordering affirmative relief in the form of bilingual instruction to remedy various constitutional and statutory violations. Cases approving such relief include *Serna* v. *Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974); *United States* v. *Texas*, 342 F.Supp. 24 (E.D. Tex. 1971), aff'd. 466 F.2d 518 (5th Cir. 1972) (per curiam) (San Felipe Del Rio Consolidated Independent School District); and *Rios* v. *Read*, 480 F.Supp. 14 (E.D.N.Y. 1978). Two cases, cited by defendants, disapproved bilingual plans. As already noted, in *Guadalupe Org. Inc.* v. *Tempe Elem. School*, 587 F.2d 1022 (9th Cir. 1978), no finding of de jure discrimination was made as a predicate to relief, and the plaintiffs conceded that the remedial program already in effect was sufficient to ensure effective participation by Mexican-American students in all-English classes. In contrast to the case at bar, bilingual instruction was proposed, not as a transitional tool, but as an educational objective in itself.

The other case principally relied upon by defendants, *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 521 F.2d 465 (10th Cir. 1975), cert. denied 423 U.S. 1066, 96 S.Ct. 806, 46 L.Ed.2d 657 (1976) did involve a constitutional violation. In disapproving the bilingual plan ordered by the district court, the Court of Appeals observed that no connection had been established at trial between the defendant school district's discriminatory practices and the harms suffered by plaintiffs. Id. at 482. In the instant case, defendants have stipulated to such a causal relationship and it has been here found that the current learning disabilities of Mexican-American students are, in substantial part, attributable to defendants' unlawful conduct. Moreover, the plan rejected in *Keyes* went "well beyond helping Hispanic school children to reach proficiency in English necessary to learn other basic subjects" Id. at 482, contrary to the transmuting role contemplated for bilingual instruction in the present case. Thus, neither *Guadalupe* nor *Keyes* stands for the proposition that bilingual education, as a general rule, is an inappropriate remedial tool. The facts of both cases render them inapplicable to the instant case.

An additional case which warrants discussion is *Morales* v. *Shannon*, 366 F.Supp. 813 (W.D.Tex.1973), reversed 516 F.2d 411 (5th Cir. 1975), cert. denied 423 U.S. 1034, 96 S.Ct. 566, 46 L.Ed.2d 408 (1976). The plaintiffs in *Morales* claimed that the Uvalde, Texas, school district intentionally had discriminated against Mexican-American students. As an element of relief, they sought bilingual instruction. The district court found no deliberate discrimination and held for the defendants. On appeal, the Court of Appeals for the Fifth Circuit reversed the district court on the issue of de jure discrimination and remanded the case for formulation of an appropriate remedy. In addressing the specific bilingual plan sought by plaintiffs, the court commented: "It strikes us that this entire question goes to a matter reserved for educators." 516 F.2d at 415.

The significance of this dictum in *Morales* must be assessed in light of the trial record on which the Court of Appeals based its opinion. Reviewing the testimony concerning bilingual education presented at trial, the district court noted that the witnesses offered "widely differing and conflicting viewpoints as to the efficacy of bilingual and bicultural programs in general and to the various types of programs in particular which best serve the purpose." 366 F.Supp. at 822. The district court also observed that many of the plaintiffs' witnesses concerning bilingual education were not qualified experts and merely presented "subjective, unsubstantiated opinions" concerning the efficacy of bilingual programs. Id. Thus, the district court concluded that this particular evidentiary record did not warrant the imposition of the specific relief requested, and the Court of Appeals agreed.

It would be erroneous to interpret *Morales* as holding that bilingual instruction must never be included as part of an equitable remedy for unconstitutional discrimination. The trial record here, in sharp contrast to that in *Morales*, contains extensive testimony by well-qualified experts, based upon testing surveys and other scientific research, concerning the substantial and unique benefits of bilingual instruction in overcoming learning problems. Far from disputing that finding, the defendants conceded the desirability of bilingual education, and defendants' own witnesses advocated broadening the scope of the state's bilingual program.

Fundamental principles of equity demand that the appropriate remedy be drawn from the specific evidence brought before the court in this particular case. The record here, unlike that in *Morales*, compels the implementation of affirmative relief designed to improve the quality and expand the scope of bilingual instruction to be provided by the Texas public schools. No other remedy can completely eradicate the effects of defendants' unlawful conduct.

The United States, as plaintiff, urges the court to look to the regulations promulgated by the Department of Health, Education and Welfare (now Department of Education) under Title VI in drafting an equitable decree. Specifically, the Government asserts that the so-called "Lau Remedies" document, issued by the Department Health, Education and Welfare in 1975, be adhered to. It is true that federal departmental regulations which implement and interpret relevant statutes are entitled to great weight. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972). But the plaintiffs in this action have not prevailed on their Title VI claims. Moreover, a congressional conference committee has recently adopted the position that the "Lau Remedies" are merely suggestions, rather than requirements which must be met by school districts. H.R.Rep. No. 96-1443, 96th Cong., 2nd Sess. (1980) at 13.[17] Thus, while the "Lau Remedies" document and related Title VI regulations provide considerable guidance, they are in no way binding or dispositive in the formulation of an appropriate remedy.

[23] Complete and effective relief from the constitutional and statutory violations here found must contain the following elements:

1. Program Coverage and Content

Bilingual instruction must be provided to all Mexican-American children of limited English proficiency in the Texas public schools. Such a requirement should be effected in phases over a six year period, in order to ensure that adequate staffing and learning materials will be available. A suitable plan to train and recruit sufficient bilingual teachers to meet this requirement and a suggested timetable for implementation should be devised by TEA.

In accordance with the state's existing bilingual plan, school districts may join to provide bilingual programs on a more efficient and economical basis. Bilingual instruction must be provided in all subject areas, with the exception of art, music, physical education, and other subjects where language proficiency is not essential to effective participation. However, bilingual instruction shall not be provided in schools set aside solely for that purpose. To the extent possible, Mexican-American students receiving bilingual instruction must participate with students of other ethnic backgrounds in art, music, physical education, shop, home economics, and all other subjects where bilingual instruction is not provided, as well as at lunch, at recess, and in extra-curricular activities.[11]

2. Identification of Limited English Proficiency Students

It is essential that all students be surveyed upon initially entering the Texas public schools to determine whether they have a predominant language other than English. Students whose predominant language is Spanish shall be administered tests appropriate to their age level and meeting recognized standards of reliability to ascertain whether they are sufficiently proficient in English to participate effectively in an all-English curriculum. Teacher observation, in addition to test results, should be taken into account in classifying students with respect to proficiency in English. Local identification procedures must be monitored by the TEA through on-site verification visits.

3. Exit Criteria

Bilingual instruction, as a remedy to unlawful discrimination, is intended to serve as a transitional program. The Equal Educational Opportunities Act also requires that appropriate action be taken to overcome language barriers, until such time as students are able to participate equally in regular instructional programs. 20 U.S.C. § 1703(f). Accordingly, students classified as limited in English proficiency should remain enrolled in bilingual programs, until their placement in all-English classes will not produce any significant impairment of their learning abilities or achievements.

To accomplish this objective, students enrolled in bilingual programs should be tested at the end of each school year to resolve the extent to which their skills have progressed. In addition to English language test scores, a student's oral proficiency in English, mastery of specific language skills, subjective teacher evaluation, and parental viewpoint should also be taken into account. Moreover, a student's ability in Spanish must be compared with his ability in English, to find whether his transfer into an all-English classroom will handicap him educationally. Thus, a student who scores in the top quartile on a standardized achievement test administered in Spanish and in the third quartile on a similar test written in English is clearly not ready to be reclassified, even though such a student could function to some extent in an all-English classroom.

It will be necessary that specific statistical standards be prepared to implement these comprehensive exit criteria. Such standards must ensure that children of limited English proficiency receive bilingual instruction as long as necessary to fulfill their educational potential. Students in grades six through twelve who cannot meet the exit criteria should, nevertheless, be transferred out of bilingual programs at the unsolicited request of their parents. Finally, the application of exit standards must be monitored by TEA through on-site inspections.

4. Monitoring and Enforcement

TEA will be required to monitor local compliance with state regulations concerning bilingual education, and also with respect to the order hereafter entered, by inspecting each school district in the state at least once every three years. Local bilingual program content, program coverage, identification procedures, and reclassification are among the areas to be examined during these periodic visits. Results of TEA monitoring should be reported to both the local school district and to the Division of Accreditation of TEA. Districts found to be in serious noncompliance with state regulations or with the order to be entered in this case shall be warned and required to undertake immediate corrective action. If the violations persist, severe sanctions, including loss of accreditation and funding in appropriate instances, must be imposed.

The parties shall be ordered to meet on or before January 29, 1981, for the purpose of formulating a detailed, comprehensive plan of relief incorporating all of the elements outlined above. Such plan shall be submitted to the court by March 2, 1981. If the parties are unable to reach agreement on an appropriate remedial plan, they may submit separate proposals, in whole or in part, limited to the implementation of relief, by March 9, 1981. Following the receipt of written submissions, a final order shall be drawn up and entered. In order to ensure that school districts throughout Texas shall have sufficient time to plan appropriately for the 1981–82 school year, these deadlines must be strictly adhered to.

A plan incorporating the above elements will directly attack the remaining vestiges of de jure discrimination against Mexican-Americans in the Texas public schools. Students saddled with learning difficulties will be assured the special help they need to overcome those burdens and participate on an equal basis in the regular school curriculum. At the same time, the plan outlined above will remedy the defendants' statutory violations under the E.E.O.A. In providing bilingual instruction at all grade levels to Spanish-speaking students of limited English proficiency, the state education system will fulfill its duty to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The learning process for these children will no longer be placed in abeyance until they have mastered the English language. The relief required will also satisfy the mandate of § 1703(b) of the E.E.O.A. that "affirmative steps" be taken to root out the vestiges of prior de jure discrimination.

The relief to be ordered in this case will not, in itself, eradicate the learning disabilities engendered in the state's Mexican-American children by many decades of injustice and neglect. As the Supreme Court observed in *Milliken II:* "[r]eading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skill of specially trained teachers." 433 U.S. at 290, 97 S.Ct. at 2762. The tragic legacy of discrimination will not be swept away in the course of a day or a week or a single school year. But these children deserve, at the very least, an opportunity to achieve a productive and fulfilling place in American society. Unless they receive instruction in a language they can understand pending the time when they are able to make the transition to all-English classrooms, hundreds of thousands of Mexican-American children in Texas will remain educationally crippled for life, denied the equal opportunity which most Americans take for granted. These children have waited long enough to reap the benefits of an adequate education. The more quickly the ethnic injustices of the past can be overcome, the sooner this nation can face, as one People, the challenges of the future.

ORDER

A memorandum opinion setting forth comprehensive findings of fact and conclusions of law having been filed in the above-referenced civil action on this day, an order specifying the actions to be undertaken to effectuate the general directions contained in that opinion is necessary. The considerable expertise of the parties with respect to the issues raised in this action constitutes a principal resource in the formulation of such a decree.

It is accordingly ORDERED that lead counsel for all parties in the above-referenced civil action shall meet in person on or before January 29, 1981, for the purpose of formulating a detailed, comprehensive plan of relief incorporating all of the elements outlined in the memorandum opinion. If the parties are able to agree upon a proposed form of decree, their proposal shall be submitted to the court on or before March 2, 1981. In the event that the parties are unable to agree upon the terms of a proposed decree, each party shall submit a separate proposal to the court on or before March 9, 1981. All proposed forms of decree submitted shall be based solely upon the facts and conclusions contained in the memorandum opinion. The court will not entertain further evidence or argument relevant to any of the issues addressed therein.

NOTES

1. A number of actions in addition to the one addressed in this opinion have been brought under the aegis of the order of July 13, 1971. For example, segregation of Mexican-American students in the San Felipe and Del Rio Independent School Districts, in violation of the court's order, was alleged in 1971. Unconstitutional discrimination was found and relief was ordered. *United States* v. *Texas*, 342 F.Supp. 24 (E.D. Tex.1971) (*San Felipe Del Rio Consolidated Independent School District*). In another suit spawned by the original 1971 court order, intentional, statewide discrimination against Mexican-American students was found to be practiced by TEA. *United States* v. *Texas*, 498 F.Supp. 1356 (E.D. Tex.1980) (*Gregory-Portland Independent School District Intervention*). The *Gregory-Portland* decision, discussed in greater detail below, touched upon many of the same issues involved in the instant action.

2. The term "Anglo" shall be used throughout this memorandum opinion in referring to caucasians, i.e., those persons who are neither Mexican-American nor Black nor members of any other racial or ethnic minority which is generally identified as "non-White."

3. Some 456 stipulations of fact, agreed to by all parties, were set forth in a single document entitled "STIPULATIONS" and introduced at the opening of trial as Plaintiff-Intervenors' Exhibit 409. References to specific stipulations contained within this exhibit will be abbreviated as "Pl.-Int. Ex. 409, # " throughout this opinion.

4. Prior to the Supreme Court's decision in *Keyes*, the Court of Appeals for the Fifth Circuit had held that proof of discriminatory impact was sufficient to make out a violation of the Fourteenth Amendment. E.g., *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (1972) (en banc). Thus, the issue of intent was not raised when this court rendered its initial decision in *United States* v. *Texas* in 1971.

5. This is not a case, like *Dayton I*, where the incremental impact of isolated instances of discrimination can be quantified and specifically ascertained. Here, the proven violation is systemwide in its scope and impact. Moreover, generalized learning impairment, in contrast to statistically-imbalanced student populations, does not lend itself to such an analysis. In the

former case, it is enough to identify a specific cause of present injury, produced by defendants' unconstitutional actions, and to devise a remedy which will eliminate that cause of harm. Such an approach is qualitative rather than quantitative in nature, but it fully satisfies the fundamental requirement that the scope of relief be determined by the scope of the violation and its resulting harm. *Swann*, 402 U.S. at 16, 91 S.Ct. at 1276.

6. The Texas Bilingual Education Act was not limited in scope to Mexican-American children. The statute encompassed all students with a native language other than English with learning difficulties. Yet the record indicates that more than ninety-five percent of all Texas schoolchildren with limited English-speaking ability are of Mexican-American ancestry, with Spanish as their dominant language. Throughout the remainder of this opinion, the attributes and effectiveness of the state's educational programs shall be assessed exclusively as they pertain to this class of Mexican-Americans, which has been victimized by the historical discrimination described above. Aside from Mexican-Americans, the legal sufficiency of the defendants' educational programs which involve students who speak other languages than English is beyond the scope of this litigation and will not be addressed in this opinion.

7. The terms "bilingual education" and "bilingual-bicultural education" will be used interchangeably throughout this opinion. As evidenced by the definition found in the "Bilingual Education Act," quoted above, appreciation for the foreign language student's cultural heritage is an inherent part of any comprehensive bilingual program. The parties have stipulated that "[t]he incorporation of the history and culture associated with a student's dominant language into the instructional process is an integral part of bilingual-bicultural education." Pl.-Int. Ex. 409, # 1116.

8. An alternative approach, described by Vidal Trevino, Superintendent of the Laredo Independent School District, as the "cold turkey method," Def. Ex. 95 at 7, involves placing a foreign language student without proficiency in English into a regular English language class, absent special instruction of any kind. None of the testimony at trial indicated that this was a productive or effective educational method. Indeed, the parties stipulated that to expect such children to achieve success in our educational system without making special provision for their language difficulties is an illusion. Pl.-Int. Ex. 409, # 1119.

9. The Commission noted in its report that in the absence of past discrimination or negative socioeconomic conditions, foreign language children could often achieve academic success without bilingual instruction. Id. at 69-74. Conversely, where widespread discrimination has occurred, as is the case with respect to Mexican-Americans in Texas, bilingual instruction serves to remove the sense of inferiority and other learning barriers established by that discrimination and restores equal educational opportunity. Id. at 137-141.

10. The state statute uses the phrase "limited English-speaking ability" to describe those eligible for bilingual education, while the federal Bilingual Education Act employs the term "limited English proficiency." The state itself recognizes that the purpose of bilingual education is to further a child's ability to learn in an English-language classroom, not merely to improve oral speech. Limited English "proficiency," which encompasses reading, writing, and understanding the language, in addition to speech, is the more precise term and will be used in lieu of the phrase "limited English speaking ability" throughout the remainder of this opinion.

11. The significance of percentile scores on standardized tests obviously depends upon the test population to which a particular student is being compared. The approved tests specified by the TEA as exit criteria are national in scope of administration. Documentary evidence indicates that the threshold percentile scores adopted referred to a statistical comparison with all students taking the test throughout the United States. Alternatively, the TEA could have employed a relative scale based upon scores achieved by students in Texas or by Anglo students nationwide or by any other particular subset of the overall national student population. Such a change in the base population would necessarily alter the significance of a particular percentile score.

12. Plaintiffs do not assert an independent constitutional right to intelligible instruction, outside the context of past de jure discrimination. Such a claim would necessarily require a confrontation with the

crucial question left unanswered by the Supreme Court in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). In *Rodriguez*, the Court held that mere discrepancies in the amount of funding provided for public education did not infringe upon any fundamental constitutional right. Id. at 36-37, 93 S.Ct. at 1298-1299. But the Court left open the possibility that an absolute denial of educational opportunity could constitute, in itself, a denial of equal protection subject to strict scrutiny. Id. See also *Doe* v. *Plyler*, 628 F.2d 448, 456-57 (5th Cir. 1980); *Fialkowski* v. *Shapp*, 405 F.Supp. 946, 958 (E.D. Pa. 1975) (holding absolute deprivation of education unconstitutional). Moreover, even in the wake of *Rodriguez*, a minimum quantum of education may be constitutionally protected as a necessary prerequisite to the exercise of other constitutional rights.

In *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), discussed below, the Supreme Court observed that students who do not understand English and are placed in all-English classrooms "are certain to find their classroom experiences *wholly* incomprehensible and *in no way* meaningful." Id. at 566, 94 S.Ct. at 788 (emphasis added). Such students, the Court found, "are effectively foreclosed from *any* meaningful education." Id. (emphasis added). Thus it could be argued that the defendants' failure to provide appropriate remedial instruction to Spanish-speaking children constitutes, in effect, an absolute deprivation of education, impinging upon a fundamental right and triggering strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. In light of the parties' failure to raise this claim, and also giving consideration to the disposition of the remainder of the case, no effort will be made to decide this important question or to address it in greater detail.

13. The text of the statute is as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

14. This conclusion is not affected by *Serna* v. *Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974), *Lora* v. *Board of Education of the City of New York*, 456 F.Supp. 1211 (E.D.N.Y. 1978), or any other Title VI cases decided prior to the Court's decision in *Bakke*.

15. Long before *Milliken*, the Court of Appeals for the Fifth Circuit had required remedial education programs as an element of equitable relief in the desgregation context to help students overcome past inadequacies in their educational opportunities. *United States* v. *Jefferson County Bd. of Ed.* 372 F.2d 836, 900 (1966), cert. denied 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967). See also *United States* v. *Texas*, 342 F.Supp. 24 (E.D.Tex.1971), aff'd 466 F.2d 518 (5th Cir. 1972) (per curiam). These cases and others have recognized that the legacy of discrimination endures long after the schools have been desegregated, unless special remedial measures are undertaken to compensate for past inequities.

The Court of Appeals for the Third Circuit has also addressed the use of compensatory education programs to cure learning disabilities resulting in whole or in part from unlawful discrimination. *Evans* v. *Buchanan*, 582 F.2d 750, 767-69 (1978) (en banc), aff'd. 446 U.S. 923, 100 S.Ct. 1862, 64 L.Ed.2d 278 (1980). Relying primarily upon *Milliken*, the court carefully reviewed and approved a wide variety of programs, including teacher training, curriculum development, remedial reading instruction, and student counseling to eliminate the vestiges of de jure discrimination in the suburbs of Wilmington, Delaware. Id. at 769-74.

16. It should also be noted that one major reason for the present shortages of bilingual teachers is the defendants' discriminatory failure to hire Mexican-American faculty members in the past. Many school districts with large numbers of Mexican-American students refused until recently to hire any teachers with that ethnic background. For example, in 1969, the Sonora Independent School District had a Mexican-American majority in its student population, but employed no Mexican-American faculty members. Gov.Ex. C-219 at 33-34. Similarly, in 1971, the student body of La Feria Independent School District was 78.1 percent Mexican-American, but only 6.9 percent of the district's teachers shared that ethnic heritage. Gov. Ex. C-11a at 15.

17. The Secretary of Education recently promulgated proposed regulations regarding special educational programs for students of limited English language proficiency to replace the "Lau Remedies." But Congress has enacted legislation prohibiting the expenditure of funds for the adoption of enforcement of any such final regulations prior to June 1, 1981. H.J. Res. 664, § 117 (96th Cong., 2nd Sess.).

18. The purpose of the aforementioned measures is to ensure that the expansion of bilingual instruction does not serve to exacerbate existing segregation of students on ethnic grounds. It would be both inappropriate and counterproductive to separate students by ethnic background as a means of remedying past discrimination. Separation in the bilingual classes themselves is unavoidable, except to the extent that Anglo students may volunteer to participate in such classes for their own educational enrichment. But it is imperative that students be integrated, irrespective of national origin, throughout the school day, other than when bilingual instruction is in progress.

* * *

Note: This decision was overturned on appeal by the Fifth U.S. Circuit Court of Appeals on July 13, 1982. The court ruled that the "entire factual underpinning" of the district court's decision was "fundamentally flawed" and that it formed "a slender basis indeed for the sweeping statewide order imposed by the trial court." The appeals court also suggested that the district court should have considered whether the 1981 Texas bilingual education law, which requires bilingual education in elementary schools in districts with twenty or more students of limited English-speaking ability, made the entire case moot.

Elizabeth and Katherine CASTANEDA, by
their father and next friend, Roy C. Castaneda,
et al., Plaintiffs-Appellants,
v.
Mrs. A.M. "Billy" PICKARD, President,
Raymondville Independent School District,
Board of Trustees, et al., Defendants-Appellees.

No. 79-2253.

United States Court of Appeals,
Fifth Circuit.
Unit A
June 23, 1981.

James A. Herrmann, Texas Rural Legal Aid, Inc., Harlingen, Tex., for plaintiffs-appellants.

Michael K. Swan, Jeffrey A. Davis, Houston, Tex., for Pickard, et al.

Barbara C. Marquardt, Asst. Atty. Gen. of Texas, Austin, Tex., for Brockette, et al.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RANDALL and TATE, Circuit Judges.

RANDALL, Circuit Judge:

Plaintiffs, Mexican-American children and their parents who represent a class of others similarly situated, instituted this action against the Raymondville, Texas Independent School District (RISD) alleging that the district engaged in policies and practices of racial discrimination against Mexican-Americans which deprived the plaintiffs and their class of rights secured to them by the fourteenth amendment and 42 U.S.C. § 1983 (1976), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1976), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 et seq. (1976). Specifically, plaintiffs charged that the school district unlawfully discriminated against them by using an ability grouping system for classroom assignments which was based on racially and ethnically discriminatory criteria and resulted in impermissible classroom segregation, by discriminating against Mexican-Americans in the hiring and promotion of faculty and administrators, and by failing to implement adequate bilingual education to overcome the linguistic barriers that impede the plaintiffs' equal participation in the educational program of the district.[1] The original complaint also named the Secretary of the Department of Health, Education and Welfare (HEW) as a defendant and alleged that the department, although charged with responsibility to assure that federal funds are spent in a nondiscriminatory manner and cognizant of the school district's noncompliance with federal law, had failed to take appropriate action to remedy the unlawful practices of the school district or to terminate its receipt of federal funds. By an amended complaint, the plaintiffs also named the Texas Education Agency (TEA) as a defendant and charged that the TEA had failed to fulfill its duty to assure that the class represented by the plaintiffs was not subjected to discriminatory practices through the use of state or federal funds.

The case was tried in June 1978; on August 17, 1978 the district court entered judgment in favor of the defendants based upon its determination that the policies and practices of the RISD, in the areas of hiring and promotion of faculty and administrators, ability grouping of students, and bilingual education did not violate any constitutional or statutory rights of the plaintiff class. From that judgment, the plaintiffs have brought this appeal in which they claim the district court erred in numerous matters of fact and law.

Although upon motion of the plaintiffs, HEW was dismissed as a defendant in this suit before trial, the agency remains an important actor in our current inquiry because this private litigation involves many of the same issues considered in an HEW administrative investigation and fund termination proceeding involving RISD. In April 1973, following a visit from representatives of HEW's Office for Civil Rights (OCR), HEW notified RISD that it failed to comply with the provisions of Title VI and administrative regulations issued by the Department to implement Title VI. HEW requested that RISD submit an affirmative plan for remedying these deficiencies. Apparently, RISD and the OCR were unable to negotiate a mutually acceptable plan for compliance and in June 1976, formal administrative enforcement proceedings were instituted in which the OCR sought to terminate federal funding to RISD. RISD requested a hearing on the allegations of noncompliance and in January 1977, a five day hearing was held before an administrative law judge. Thereafter, the judge entered a decision which concluded that RISD was not in violation of Title VI or the administrative regulations and policies issued thereunder. The judge ordered that the suspension of federal funds to the district be lifted. This decision was affirmed in April 1980, by a final decision of the Reviewing Authority of the OCR.

The extensive record of these administrative proceedings, including the transcript of the hearing before the administrative law judge and the judge's decision, was received into the record as evidence in the trial of this case and included in the record on appeal. The defendants have moved to supplement the appellate record by including the decision of the Reviewing Authority. This motion was carried with the appeal. Since the record in this case already includes extensive material from this administrative proceeding, which involved many of the same questions of fact and law as this case, we see no reason why the final administrative determination of those questions should not also be included. The defendants' motion to supplement the appellate record in this cause to include the final decision of the Reviewing Authority of OCR is, therefore, granted.

Before we turn to consider the specific factual and legal issues raised by the plaintiffs in their appeal of the district court's judgment, we think it helpful to outline some of the basic demographic characteristics of the Raymondville school district. Raymondville is located in Willacy County, Texas. Willacy County is in the Rio Grande Valley; by conservative estimate based on census data, 77% of the population of the county is Mexican-American and almost all of the remaining 23% is "Anglo." The student population of RISD is about 85% Mexican-American.

Willacy County ranks 248th out of the 254 Texas counties in average family income. Approximately one-third of the population of Raymondville is composed of migrant farm workers. Three-quarters of the students in the Raymondville schools qualify for the federally funded free school lunch program. The district's assessed property valuation places it among the lowest ten percent of all Texas counties in its per capita student expenditures.

The district operates five schools. Two campuses, L.C. Smith and Pittman, house students in kindergarten through fifth grade. The student body at L.C. Smith is virtually 100% Mexican-American; Pittman, which has almost twice as many students, has approximately 83% Mexican-American students. There is one junior high school, which has 87% Mexican-American students, and one high school, in which the enrollment is 80% Mexican-American.

I. A THRESHOLD OBSTACLE TO APPELLATE REVIEW

In their brief on appeal, the plaintiffs contend first, that the analysis of the memorandum opinion in which the district court concluded that the challenged policies and practices of the RISD did not violate the fourteenth amendment, Title VI or the Equal Educational Opportunities Act is pervasively flawed by the court's failure to make findings concerning the history of discrimination in the RISD in assessing the plaintiffs' challenges to certain current policies and practices. Plaintiffs contend that these issues were properly raised by the pleadings and that there was ample evidence in the record to support findings that RISD had, in the past, segregated and discriminated against Mexican-American students and that, as yet, RISD has failed to establish a unitary system in which all vestiges of this earlier unlawful segregation have been eliminated because the virtually 100% Mexican-American school, L.C. Smith, is a product of this earlier unlawful policy of segregation. Although the plaintiffs in this case did not challenge the current student assignment practices of the RISD (which are no longer based on attendance zones but rather on a freedom of choice plan) or request relief designed to alter the ethnic composition of the student body at L.C. Smith, the evidence of past segregative practices of RISD was relevant to the legal analysis of two of the claims the plaintiffs did make.

The plaintiffs here challenge the RISD's ability grouping system which is used to place students in particular sections or classes within their grade. We have consistently stated that ability grouping is not per se unconstitutional. In considering the propriety of ability grouping in a system having a history of unlawful segregation, however, we have cautioned that if testing or other ability grouping practices have a markedly disparate impact on students of different races and a significant racially segregative effect, such practices cannot be employed until a school system has achieved unitary status and maintained a unitary school system for a sufficient period of time that the handicaps which past segregative practices may have inflicted on minority students and which may adversely affect their performance have been erased. *United States* v. *Gadsden County School District,* 572 F.2d 1049 (5th Cir. 1978); *Morales* v. *Shannon,* 516 F.2d 411 (5th Cir. 1975); *McNeal* v. *Tate County School District,* 508 F.2d 1017 (5th Cir. 1975); *Moses* v. *Washington Parish School Board,* 456 F.2d 1285 (5th Cir. 1972); *Lemon* v. *Bossier Parish School Board,* 444 F.2d 1400 (5th Cir. 1971); *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211, 1219 (5th Cir. 1969).

The question whether RISD has a history of unlawful discrimination is also relevant to the analysis of plaintiffs' claim regarding the district's employment practices. In cases involving claims similar to those made here regarding a pattern or practice of discrimination in the employment of faculty and staff, we have held that when such a claim is asserted against a school district having a relatively recent history of discrimination, the burden placed on the defendant school board to rebut a plaintiff's prima facie case is heavier than the burden of rebuttal in the usual employment discrimination case. In a case involving a school district with a history of discrimination, the defendant must rebut the plaintiff's prima facie case by clear and convincing evidence that the challenged employment decisions were motivated by legitimate nondiscriminatory reasons. *Lee* v. *Conecuh County Board of Education,* 634 F.2d 959 (5th Cir. 1981); *Lee* v. *Washington County Board of Education,* 625 F.2d 1235, 1237 (5th Cir. 1980); *Davis* v. *Board of School Commissioners,* 600 F.2d 470, 473 (5th Cir. 1979); *Hereford* v. *Huntsville Board of Education,* 574 F.2d 268, 270 (5th Cir. 1978); *Barnes* v. *Jones County School District,* 544 F.2d 804, 807 (5th Cir. 1977). This, of course, is a much heavier burden of rebuttal than that imposed on an employer in the usual employment discrimination case under *Texas Department of Community Affairs* v. *Burdine,*—U.S.—, —, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).[2]

Plaintiffs raised the issue of RISD's past discrimination in their pleadings and introduced substantial evidence in support of this claim in the proceedings before the district court;[3] thus, the district court's failure to make findings regarding the history of the district and whether vestiges of past discrimination currently exist in the district cannot be excused on the grounds that these issues were not properly before the court. The absence of findings on these issues seriously handicaps our review of the merits of the ability grouping and employment discrimination claims made by the plaintiffs in this case. With regard to plaintiffs' first two arguments on appeal, our opinion will, therefore, be limited to identifying the factual and legal determinations which, although necessary to a proper analysis of the plaintiffs' claims, were not made by the district court and must be made upon remand and to reviewing those aspects of the merits of these claims which are not affected by this failure to make certain essential findings.

II. ABILITY GROUPING

RISD employs an ability grouping system of student assignment. In the elementary grades and the junior high school, students are placed in a particular ability group (labeled "high," "average" or "low") based on achievement test scores, school grades, teacher evaluations and the recommendation of school counselors. In grades 1–6, once students have been placed in a particular ability group, they are assigned to a specific class for that group by a random manual sorting system designed to assure that each classroom has a roughly equal number of girls and boys. After the junior high school students are grouped by ability, they are assigned to particular sections of their ability group by computer. Although Raymondville High School offers courses of varying pace and difficulty, students are not assigned to particular ability groups. High school students, with the assistance of their parents and school counselors, choose the subjects they wish to study (subject, of course, to the usual sort of prerequisites and curriculum required for graduation) and are free to select an accelerated, average or slower class. Plaintiffs claim that these ability grouping practices unlawfully segregate the Mexican-American students of the district.

As we noted above, this circuit has consistently taken the position that ability grouping of students is not, per se, unconstitutional. The merits of a program which places students in classrooms with others perceived to have similar abilities are hotly debated by educators; nevertheless, it is educators, rather than courts, who are in a better position ultimately to resolve the question whether such a practice is, on the whole, more beneficial than detrimental to the students involved. Thus, as a general rule, school systems are free to employ ability grouping, even when such a policy has a segregative effect, so long, of course, as such a practice is genuinely motivated by educational concerns and not discriminatory motives. However, in school districts which have a past history of unlawful discrimination and are in the process of converting to a unitary school system, or have only recently completed such a conversion, ability grouping is subject to much closer judicial scrutiny. Under these circumstances we have prohibited districts from employing ability grouping as a device for assigning students to schools or classrooms, *United States* v. *Gadsden County School District*, supra; *McNeal* v. *Tate County School District*, supra. The rationale supporting judicial proscription of ability grouping under these circumstances is two-fold. First, ability grouping, when employed in such transitional circumstances may perpetuate the effects of past discrimination by resegregating, on the basis of ability, students who were previously segregated in inferior schools on the basis of race or national origin. Second, a relatively recent history of discrimination may be probative evidence of a discriminatory motive which, when coupled with evidence of the segregative effect of ability grouping practices, may support a finding of unconstitutional discrimination.

Thus, in a case where the ability grouping practices of a school system are challenged, the court must always consider the history of the school system involved. If the system has no history of discrimination, or, if despite such a history, the system has achieved unitary status and maintained such status for a sufficient period of time that it seems reasonable to assume that any racially disparate impact of the ability grouping does not reflect either the lingering effects of past segregation or a contemporary segregative intent, then no impermissible racial classification is involved and ability grouping may be employed despite segregative effects. However, if the district's history reveals a story of unremedied discrimination, or remedies of a very recent vintage which may not yet be fully effective to erase the effects of past discrimination, then the courts must scrutinize the effects of ability grouping with "punctilious care." *McNeal* v. *Tate County School District*, id. at 1020. Even under these circumstances, however, ability grouping is not always impermissible. If the statistical results of the ability grouping practices do not indicate "abnormal or unusual" segregation of students along racial lines, the practice is acceptable even in a system still pursuing desegregation efforts. *Morales* v. *Shannon*, supra at 414.

Despite the absence of district court findings on the questions whether RISD has a history of discrimination against Mexican-Americans and whether any past discrimination has been fully remedied, we are able to consider the merits of plaintiffs' ability grouping claim insofar as it challenges the practices employed in grades 9-12. We note, first, that although different high school courses in Raymondville may be designed to accommodate students of different abilities or interests, self-selection, by students and parents, plays a very large part in the process by which students end up in a particular course. In light of this fact, we cannot conclude that "ability grouping," insofar as that term refers to the practice of a school in assigning a student to a particular educational program designed for individuals of particular ability or achievement, is, in fact, employed at the high school level.

The district court's failure to make findings concerning the RISD's history does, however, severely handicap our review of the ability grouping practices employed in the central campus elementary school and the junior high school. RISD contends that we should deem these practices unobjectionable because even if the district court were to find that RISD has a history of unlawful discrimination, the effects of which have not yet been fully and finally remedied, the statistical results of RISD's ability grouping practices, are, like the results of the ability grouping employed in *Morales* v. *Shannon*, supra, "not so abnormal or unusual . . . as to justify an inference of discrimination." Id. at 414. We cannot agree. In *Morales*, the overall student population in the grades where ability grouping was practiced was approximately 60% Mexican-American and 40% Anglo; however, approximately 61% of the students assigned to "high" groups were Anglo. Thus. 1:5 times as many Anglos were assigned to high groups as were enrolled in these grades as a whole. In Raymondville, the statistical results of the ability grouping are definitely more marked. For example, in grades kindergarten through three, during the academic year 1977-78, Anglo students formed approximately 17% of the student population at the central elementary campus; however 41% of the students in "high" ability classes for those grades were Anglo. Thus, there were approximately 2.4 times as many Anglos in high ability classes as there were in these grades as a whole. The figures in the upper grades for this year are comparable. In grades 4 and 5, there were approximately 2.3 times as many Anglos in high ability classes as in these grades as a whole; and in the junior high school grades 6-8, there were approximately 2.6 times as many Anglos in high groups as in the junior high school as a whole.

Statistical results such as these would not be permissible in a school system which has not yet attained, or only very recently attained, unitary status. Thus it is essential to examine the history of the RISD in order to determine the merits of the plaintiffs' claims. On remand, therefore, the district court should reconsider the plaintiffs' allegation that the ability grouping practices of the RISD are unlawful, insofar as grades K-8 are concerned, in light of the conclusions it reaches concerning the history of the district and the question whether it currently operates a unitary school system. If the district court finds that RISD has a past history of discrimination and has not yet maintained a unitary school system for a sufficient period of time that the effects of this history may reasonably be deemed to have been fully erased, the district's current practices of ability grouping are barred because of their markedly segregative effect.

The historical inquiry is not, however, the only one that the district court must make on remand in order to determine the merits of the plaintiffs' claims that RISD's ability grouping practices are unlawful. The record suggests that in Raymondville "ability grouping" is intertwined with the district's language remediation efforts and this intersection raises questions not present in our earlier cases involving ability grouping. The record indicates that the primary "ability" assessed by the district's ability grouping practices in the early grades is the English language proficiency of the students. Students entering RISD kindergarten classes are given a test to determine whether their dominant language is English or Spanish. Predominantly Spanish speaking children are then placed in groups designated "low" and receive intensive bilingual instruction. "High" groups are those composed of students whose dominant language is English. "Ability groups" for first, second and third grade are determined by three basic factors: school grades, teacher recommendations and scores on standardized achievement tests. These tests are administered in English and cannot, of course, be expected to accurately assess the "ability" of a student who has limited English language skills and has been receiving a substantial part of his or her education in another language as part of a bilingual education program.

Nothing in our earlier cases involving ability grouping circumscribes the discretion of a school district, even one having a prior history of segregation, in choosing to group children on the basis of language for purposes of a language remediation or bilingual education program. Even though such a practice would predictably result in some segregation, the benefits which would accrue to Spanish speaking students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation.[4] See *McNeal* v. *Tate County School District*, supra at 1020 (ability grouping may be permitted in a school district with a history of segregation "if the district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.")

Language grouping is, therefore, an unobjectionable practice, even in a district with a past history of discrimination. However, a practice which actually groups children on the basis of their language ability and then identifies these groups not by a description of their language ability but with a general ability label is, we think, highly suspect. In a district with a past history of discrimination, such a practice clearly has the effect of perpetuating the stigma of inferiority originally imposed on Spanish speaking children by past practices of discrimination. Even in the absence of such a history, we think that if the district court finds that the RISD's ability grouping practices operate to confuse measures of two different characteristics, i.e., language and intelligence, with the result that predominantly Spanish speaking children are inaccurately labeled as "low ability," the court should consider the extent to which such an irrational procedure may in and of itself be evidence of a discriminatory intent to stigmatize these children as inferior on the basis of their ethnic background.

III. TEACHERS

Testimony given in both the administrative proceeding and the trial of this civil suit indicates that the relatively small number of Mexican-American teachers and administrators employed by the Raymondville school district is a matter of great concern to Mexican-American students and their parents. Many persons in the community apparently believe that the disparity between the percentage of teachers in the district who are Mexican-American, 27%, and the percentage of students who are Mexican-American, 88%, is one of the major reasons for the underachievement and high dropout rate of Mexican-American students in Raymondville. Plaintiffs urge that this statistical disparity is both the result of, and evidence of, unlawful discrimination by RISD. The school district insists that it shares this desire to see more Mexican-American teachers employed in Raymondville schools, and argues that the current situation is not the result of unlawful discrimination on its part, but rather a reflection of the fact that certain characteristics of Raymondville, notably the lack of cultural activities and housing, make it difficult to recruit Mexican-American teachers, who are actively sought by many other school districts in Texas. The district court agreed with the RISD's contentions and concluded that the school district did not discriminate against Mexican-Americans in either the hiring or promotion of teachers or administrators.

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In order to review the merits of that conclusion, we think it appropriate to examine first the precise legal basis for the teacher discrimination claim advanced by the plaintiffs in order to discern the correct legal framework for our review.

At the outset we note that the question whether RISD discriminates in the employment or promotion of teachers or administrators reaches us in a somewhat unusual posture. The class of plaintiffs in this case includes only Mexican-American students and their parents; no RISD employee, former employee or applicant for employment by the district is a party to this suit. Although students and parents are not typically the persons who bring suit to remedy alleged discrimination in the hiring and promotion of teachers and administrators in a school district, we do not believe they lack standing to do so. Plaintiffs premise their claim on the fourteenth amendment, and 42 U.S.C. § 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and the Equal Educational Opportunity Act, 20 U.S.C. § 1701 et seq. The Equal Educational Opportunities Act (EEOA) explicitly provides in § 1703(d) that "discrimination by an educational agency on the basis of race, color or national origin in the employment . . . of faculty or staff" constitutes a denial of equal educational opportunity. The statute also expressly provides a private right of action for persons denied such an "equal educational opportunity" in § 1706. Thus the class of students here clearly have standing to complain of, and a private cause of action for relief from, alleged discrimination by RISD in the hiring and promotion of teachers and staff under this statute.

With regard to the plaintiffs' rights to assert a claim based upon this type of discrimination under the constitution and Title VI, we note that historically, dual school systems were maintained not only by segregation of students on the basis of race but also through discrimination in hiring and assignment of teachers. Consequently, as part of the remedy ordered in school desegregation cases, we have often included a provision intended to assure that a school district did not perpetuate unlawful school segregation through discriminatory employment practices.[5] Such remedial orders implicitly acknowledge that the Equal Protection Clause, which outlaws discrimination on the basis of race or national origin in public education, requires not only that students shall not themselves be discriminated against on the basis of race by assignment to a particular school or classroom, but that they shall not be deprived of an equal educational opportunity by being forced to receive instruction from a faculty and administration composed of persons selected on the basis of unlawful racial or ethnic criteria. Thus, we think that the class of plaintiffs here may also assert a cause of action based upon unconstitutional racial discrimination in employment of teachers and administrators under 42 U.S.C. § 1983. In making this claim, the students are not attempting to vindicate the constitutional rights of the teachers involved but only seeking to remedy a denial of equal protection they claim to have suffered as a result of faculty discrimination. They have thus suffered an "injury in fact" and have shown a "sufficient personal stake in the outcome of the controversy" to establish their standing to assert a claim that RISD discriminates in its employment practices. *Tasby* v. *Estes,* 634 F.2d 1103 (5th Cir. 1981); *Otero* v. *Mesa Valley School District No. 51,* 568 F.2d 1312, 1314 (10th Cir. 1977) (quoting *Sierra Club* v. *Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1976)).

With regard to Title VI, although the Supreme Court has never explicitly so held, there is authority in this circuit acknowledging a private right of action under this statute.

Bossier Parish School Board v. *Lemon,* 370 F.2d 847, 852-51 (5th Cir.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967). In any event, since a majority of the Court has now taken the position that Title VI proscribes the same scope of classifications based on race as does the Equal Protection Clause, *University of California Regents* v. *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the question whether plaintiffs have an independent cause of action under that statute is not a significant one in this case.

Having concluded that the plaintiffs in this case have standing and a cause of action to complain of discrimination by RISD in the employment of faculty and staff, we turn to examine more carefully the elements of this cause of action and the proof adduced by the plaintiffs in support of their claim. With regard to the plaintiffs' claims based upon Title VI and the Equal Protection Clause, we note that it is now well-established that in order to assert a claim based upon unconstitutional racial discrimination a party must not only allege and prove that the challenged conduct had a differential or disparate impact upon persons of different races, but also assert and prove that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race. *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Thus, discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employers under Title VI, 42 U.S.C. § 1981 or § 1983. *Lee* v. *Conecuh County Board of Education,* 634 F.2d 959 (5th Cir. 1981); *Lee* v. *Washington County Board of Education,* 625 F.2d 1235 (5th Cir. 1980); *Crawford* v. *Western Electric Co., Inc.,* 614 F.2d 1300 (5th Cir. 1980); *Williams* v. *DeKalb County,* 582 F.2d2 (5th Cir. 1978). By contrast, in an employment discrimination action premised upon Title VII, a party may rely solely upon the disparate impact theory of discrimination recognized in *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). To establish a cause of action based upon this theory, no intent to discriminate need be shown.

The question of what constitutes "discrimination" in the employment practices of a school district within the meaning of § 1703(d) of the EEOA, specifically the question whether intent is required in order to establish a cause of action for discrimination under that statute, cannot be so easily answered by reference to established judicial interpretations of the statute. There is little judicial precedent construing this provision. After examining carefully the language and legislative history of the statute, we have, however, reached the conclusion that the discriminatory conduct proscribed by § 1703(d) is coextensive with that prohibited by the fourteenth amendment and Title VI and does not encompass conduct which might violate Title VII because, although not motivated by racial factors, it has a disparate impact upon persons of different races. Certain of the subsections of § 1703 which define the practices which constitute a denial of equal educational opportunity, explicitly include only intentional or deliberate acts. For example, § 1703(a) prohibits "deliberate segregation . . . on the basis of race, color, or national origin . . ." and § 1703(e) bans transfers of students which have "the purpose and effect" of increasing segregation. The language of 1703(d) refers only to "discrimination" and does not contain such an explicit intent requirement. In considering the EEOA under different circumstances, we have found that some of its provisions "go beyond the acts and practices proscribed prior to the EEOA's passage" and that by its terms, the statute explicitly makes unlawful practices, such as segregation of students on the basis of sex, which may not violate the fourteenth amendment because of the lesser scrutiny given sex-based classifications under the Equal Protection Clause, *United States* v. *Hinds County School Board*, 560 F.2d 619 (5th Cir. 1977). Although by language in the act explicitly prohibiting segregation on the basis of sex in pupil assignments Congress clearly evidenced an intent that the statute prohibit certain types of conduct not unlawful under the Constitution, we have found no evidence to suggest that the particular subsection which concerns us here, § 1703(d), was designed to encompass a broader variety of employment practices than the provisions of the fourteenth amendment or Title VI. As other courts confronted with the task of interpreting the EEOA have noted, the legislative history of this statute is very sparse, indeed almost nonexistent. *Guadalupe Organization, Inc.* v. *Tempe Elementary School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978). The EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965, 88 Stat. 338–41, 346–48, 352 (codified in scattered sections of 20 U.S.C.). We agree with the *Guadalupe* court's suggestion that "[t]he interpretation of floor amendments unaccompanied by illuminating debate should adhere closely to the ordinary meaning of the amendment's language." 587 F.2d at 1030. Unlike Title VII there is nothing in the language of § 1703(d) to suggest that practices having only disparate impact, as well as those motivated by a discriminatory animus, were to be prohibited. Title VII, unlike §1703(d), makes it an unlawful practice for an employer not only to "discriminate" against individuals on the basis of certain criteria but also makes it unlawful "to limit, segregate or classify [persons] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of . . . race, color, religion, sex or national origin." It is this latter provision, which was interpreted in *Griggs* to prohibit facially neutral practices having a disparate impact on persons of different races. No similar provision or description of employment practices having a disparate impact was included in the Equal Educational Opportunities Act. Thus, we conclude that the elements of plaintiff's cause of action for discrimination in the hiring and promotion of teachers and administrators under the Equal Educational Opportunities Act are the same as the elements of their claims premised on the fourteenth amendment and § 1983 and Title VI.

Although the question whether RISD unlawfully discriminates against Mexican-Americans in the hiring or promotion of faculty and administrators reaches us in the somewhat unusual posture of a case brought by students, we think the legal analysis of their claim is properly drawn from the approach used to assess the merits of more traditional class action and pattern and practice employment discrimination suits. In civil rights cases generally we have noted that a district court's finding of discrimination or no discrimination is a determination of an ultimate fact; thus, we must make an independent determination of this question. *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, 1024–25 (5th Cir. 1981); *Danner* v. *U.S. Civil Services Commission*, 635 F.2d 427 (5th Cir. 1981); *Thompson* v. *Leland Police Dep't.*, 633 F.2d 1111 (5th Cir. 1980); *Shepard* v. *Beaird-Poulan, Inc.*, 617 F.2d 87 (5th Cir. 1980); *Ramirez* v. *Sloss*, 615 F.2d 163 (5th Cir. 1980). In undertaking such an independent review, however, we are bound by the subsidiary factual determinations that the district court made in the course of considering the ultimate issue of discrimination, unless these subsidiary findings are clearly erroneous within the meaning of Fed.R.Civ.P.52(a). In this case, the district court apparently based its conclusion that RISD did not discriminate against Mexican-Americans in the hiring or promotion of teachers or administrators on subsidiary findings that: (1) RISD currently hires a higher percentage of Mexican-American applicants for teaching positions than Anglo applicants; (2) the school district hires many teachers from nearby universities which have substantial numbers of Mexican-American students; and (3) the school district has a difficult time recruiting Mexican-American teachers because, although its salaries are commensurate with those paid by other schools in the area, Raymondville has very limited housing and cultural activities. Although we do not characterize any of these subsidiary findings as clearly erroneous, we do not believe they are sufficient to support an ultimate finding that RISD does not discriminate against Mexican-Americans in the employment of teachers or administrators.

In class action or pattern and practice employment discrimination suits, the question whether the employer discriminates against a particular group in making hiring decisions requires, as a first and fundamental step, a statistical comparison between the racial composition of the employer's work force and that of the relevant labor market. In many of these cases the nature of the jobs involved suggests that the relevant labor market is coextensive with the general population in the geographical areas from which the employer might reasonably be expected to draw his work force. *Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Markey* v. *Tenneco Oil Co.*, 635 F.2d 497 (5th Cir. 1981); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980). In this case, plaintiffs have relied heavily on the disparity between the percentage of the Raymondville school population consisting of Mexican-Americans (approximately 85%) and the percentage of the faculty in the Raymondville schools who are Mexican-American (27%), in support of their contention that RISD discriminates in its employment decisions. Plaintiffs urge that this statistical disparity coupled with the evidence of a past history of segregation in the Raymondville schools sufficed to make out a prima facie case of discrimination which shifted to the defendants a heavy burden of rebuttal which they failed to meet.

We think the plaintiffs' suggested comparison is not the relevant one. Where, as here, the nature of the employment involved suggests that the pool of people qualified to fill the positions is not likely to be substantially congruent with the general population, the relevant labor market must be separately and distinctly defined. In *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Supreme Court considered the question of how to define the relevant labor pool in a case involving a claim that a school district engaged in a pattern and practice of employment discrimination in the hiring of teachers. The Court disapproved of the comparison, which had been made by the district court, between the racial composition of the district's teacher work force and the student population. Such an approach, the Court admonished, "fundamentally misconceived the role of statistics in employment discrimination cases." Id. at 308, 97 S.Ct. at 2741-42. The proper comparison in a case involving school teachers was

> between the racial composition of [the district's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market. Id.

The district court's memorandum opinion in this case does not indicate that any such comparison was made here. The district court did apparently compare the data concerning the ethnic composition of the pool of persons who applied for teaching positions in Raymondville, with the ethnic composition of the persons hired. The court found that a larger percentage of Mexican-American applicants than Anglos was hired. The record also indicates that Mexican-Americans comprise a larger percentage of the teachers hired in RISD than they do of the applicant pool. In the usual hiring discrimination case this type of applicant flow data provides a very good picture of the relevant labor market because it allows one to compare the ethnic composition of an employer's workforce with that of the pool of persons actually available for hire by the employer. *Markey*, supra, at 499. However, in cases such as this one where there is an allegation that the employer's discriminatory practices infect recruiting, the process by which applications are solicited, such applicant flow data cannot be taken at face value and assumed to constitute an accurate picture of the relevant labor market. Discriminatory recruiting practices may skew the ethnic composition of the applicant pool. B.L. Schlei and P. Grossman, *Employment Discrimination Law*, 445 (1976).

In a case such as this one, the relevant labor market must first be defined separately from the applicant pool in order to determine the merits of the claim of discrimination in recruiting. A statistically significant disparity between the racial composition of the applicant pool and that of the relevant labor market may create a prima facie case of discrimination in recruiting. Because determination of the relevant labor market, the geographical area from which we might reasonably expect RISD to draw applicants and teachers, and of the ethnic composition of the group of persons qualified for teaching positions in this area, is an essentially factual matter within the special competence of the district court, *Hazelwood*, supra at 312, 97 S.Ct. at 2744, *Markey*, supra at 498, we remand the issue of discrimination in teacher hiring to the district court for further findings in accordance with the analysis the Supreme Court delineated in *Hazelwood* and which we have employed in class action and pattern and practice employment discrimination suits. See, e.g., *Phillips* v. *Joint Legislative Committee*, supra at 1024-25; *Markey*, supra; *E.E.O.C.* v. *Datapoint Corporation*, 570 F.2d 1264 (5th Cir. 1978).

With regard to the question whether RISD discriminates in the hiring or promotion of persons to administrative positions in the district, the district court concluded that there was no discrimination in this area. In recent years, the percentage of Mexican-Americans serving in administrative positions in the Raymondville School District has been roughly comparable to the percentage of Mexican-Americans on the faculty. For example in 1976, Mexican-Americans occupied 5 of the 16 administrative positions in the district (24%); in the same year 26% of the district's teachers were Mexican-American. Given the small numbers involved we are not prepared to term this a significant disparity. The record indicates that, as a general rule, the RISD prefers to hire administrative personnel from within the ranks of its current employees; thus the statistical evidence in this case would not seem to support an inference of discrimination in promotion, unless, of course, discrimination in hiring is established. In that case, the district court should, on remand, reconsider the issue of discrimination in promotion as well.

The comparison of the employment statistics of RISD with the ethnic composition of the relevant labor market goes to the determination whether the plaintiff made out a prima facie case of unlawful discrimination. If, on remand, the district court concludes that plaintiffs succeeded in making out a prima facie case, the court should determine the nature and weight of the burden of rebuttal this prima facie case placed on the RISD. As we noted above, that burden may differ depending on the conclusions the district court reaches concerning the district's history. See text supra, at 994-996.

The district court must, of course, then consider whether RISD adduced evidence sufficient to rebut the plaintiffs' prima facie case, i.e., evidence tending to suggest that the statistical underrepresentation of Mexican-Americans established by the plaintiffs' prima facie case was not the result of intentional discrimination by the school district. We note that RISD has urged that since Mexican-Americans form a majority of the voting population in the school district, are present on the district's board and have, along with the Anglo majority of the board, voted for and approved most of the hiring and promotion decisions which the plaintiffs have challenged here, the district has adequately rebutted any inference of discriminatory intent which might be raised by plaintiffs' prima facie case.

Although there have been Mexican-American members on the RISD board, there is no evidence in the record that Mexican-Americans have ever formed a majority of the board. Further, the school board's role in the teacher employment process appears to be a largely ministerial one. From the minutes of the school board meetings contained in the record, it appears that the school board does not itself receive and review the files of all applicants or involve itself in the recruiting process. The minutes suggest that the superintendent presents a slate of teachers to the board for its formal approval en masse. Thus, the record suggests that the school board has delegated primary responsibility for the recruitment and hiring of teachers and administrators to the superintendent, a position which has always been occupied by an Anglo. This suggests the possibility that the Mexican-Americans on the board may not, in fact, be in a position to exercise much power over the district's employment decisions.

In any event, the Supreme Court has rejected the argument that this type of "governing majority" theory can, standing alone, rebut a prima facie case of intentional discrimination. In *Castaneda* v. *Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court considered a similar argument. *Castaneda* involved a challenge by a Mexican-American to the grand jury selection procedures employed in Hidalgo County, Texas. The state argued that the plaintiffs' prima facie case of intentional discrimination, which consisted of statistical evidence of a significant underrepresentation of Mexican-Americans on grand juries, was effectively rebutted merely by evidence that Mexican-Americans were an effective political majority in the county and occupied many county offices, including three of the five grand jury commissioners' posts. The state reasoned that these facts made it highly unlikely that Mexican-Americans were being *intentionally* excluded from the county's grand juries. The Supreme Court, however, held that such a governing majority theory could not, standing alone, discharge the burden placed on the defendants by plaintiffs' prima facie case. This is not, of course, to say that such evidence is not relevant as part of the district's rebuttal, but only that it may not be deemed conclusive.

We express no opinion as to the outcome of the inquiry which we have directed the district court to make. The question of whether the plaintiffs have made out a prima facie case of unlawful discrimination in the employment practices of the district and the question of whether that case, if made out, has been adequately rebutted are reserved to the district court in the first instance.

IV. THE BILINGUAL EDUCATION AND LANGUAGE REMEDIATION PROGRAMS OF THE RAYMONDVILLE SCHOOLS[6]

RISD currently operates a bilingual education program for all students in kindergarten through third grade.[7] The language ability of each student entering the Raymondville program is assessed when he or she enters school. The language dominance test currently employed by the district is approved for this purpose by the TEA. The program of bilingual instruction offered students in the Raymondville schools has been developed with the assistance of expert consultants retained by the TEA and employs a group of materials developed by a regional educational center operated by the TEA. The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade.

Although the program's emphasis is on the development of language skills in the two languages, other cognitive and substantive areas are addressed, e.g., mathematics skills are taught and tested in Spanish as well as English during these years. All of the teachers employed in the bilingual education program of the district have met the minimum state requirements to teach bilingual classes. However, only about half of these teachers are Mexican-American and native Spanish speakers; the other teachers in the program have been certified to teach bilingual classes following a 100 hour course designed by TEA to give them a limited Spanish vocabulary (700 words) and an understanding of the theory and methods employed in bilingual programs. Teachers in the bilingual program are assisted by classroom aides, most of whom are fluent in Spanish.

RISD does not offer a formal program of bilingual education after the third grade. In grades 4 and 5, although classroom instruction is only in English, Spanish speaking teacher aides are used to assist students having language difficulties which may impair their ability to participate in classroom activities. For students in grades 4-12 having limited English proficiency or academic deficiencies in other areas, the RISD provides assistance in the form of a learning center operated at each school This center provides a diagnostic/prescriptive program in which students' particular academic deficiencies, whether in language or other areas, are identified and addressed by special remedial programs. Approximately 1,000 of the district's students, almost one-third of the total enrollment, receive special assistance through small classes provided by these learning centers. The district also makes English as a Second Language classes and special tutoring in English available to all students in all grades; this program is especially designed to meet the needs of limited English speaking students who move into the district in grades above 3.[8]

Plaintiffs claim that the bilingual education and language remediation programs offered by the Raymondville schools are educationally deficient and unsound and that RISD's failure to alter and improve these programs places the district in violation of Title VI and the Equal Educational Opportunities Act. The plaintiffs claim that the RISD programs fail to comport with the requirements of the "*Lau* Guidelines" promulgated in 1975 by the Department of Health, Education and Welfare. Specifically, plaintiffs contend that the articulated goal of the Raymondville program—to teach limited English speaking children to read and write in both English and Spanish at grade level—is improper because it overemphasizes the development of English language skills to the detriment of the child's overall cognitive development. Under the *Lau* Guidelines, plaintiffs argue, "pressing English on the child is not the first goal of language remediation." Plaintiffs criticize not only the premise and purpose of the RISD language programs but also particular aspects of the implementation of the program. Specifically, plaintiffs take issue with the tests the district employs to identify and assess limited English speaking children and the qualifications of the teachers and staff involved in the district's language remediation program. Plaintiffs contend that in both of these areas RISD falls short of standards established by the *Lau* Guidelines and thus has fallen out of compliance with Title VI and the EEOA.

We agree with the district court that RISD's program does not violate Title VI. Much of the plaintiffs' argument with regard to Title VI is based upon the premise that the *Lau* Guidelines are administrative regulations applicable to the RISD and thus should be given great weight by us in assessing the legal sufficiency of the district's programs. This premise is, however, flawed. The Department of HEW, in assessing the district's compliance with Title VI, acknowledged that the *Lau* Guidelines were inapplicable to an evaluation of the legal sufficiency of the district's language program. The *Lau* Guidelines were formulated by the Department following the Supreme Court's decision in *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). In *Lau*, the Supreme Court determined that a school district's failure to provide any English language assistance to substantial numbers of non-English speaking Chinese students enrolled in the district's schools violated Title VI because this failure denied these students "a meaningful opportunity to participate in the educational program" offered by the school district, 414 U.S. at 568, 94 S.Ct. at 789. *Lau* involved a school district which offered many non-English speaking students *no* assistance in developing English language skills; in declaring such an omission unlawful, the Court did not dictate the form such assistance must take. Indeed the Court specifically noted that the school district might undertake any one of several permissible courses of language remediation:

> Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Id. at 565, 94 S.Ct. at 787.

The petitioners in *Lau* did not specifically request, nor did the Court require, court ordered relief in the form of bilingual education; the plaintiffs in that case sought only "that the Board of Education be directed to apply its expertise to the problem. . . ." Id.

Following the Supreme Court's decision in *Lau*, HEW developed the *Lau* Guidelines as a suggested compliance plan for school districts which, as a result of *Lau*, were in violation of Title VI because they failed to provide *any* English language assistance to students having limited English proficiency. Clearly, Raymondville is not culpable of such a failure. Under these circumstances, the fact that Raymondville provides (and long has provided) a program of language remediation which differs in some respects from these guidelines is, as the opinion of the Reviewing Authority for the OCR noted, "not in itself sufficient to rule that program unlawful in the first instance."

The *Lau* Guidelines were the result of a policy conference organized by HEW; these guidelines were not developed through the usual administrative procedures employed to draft administrative rules or regulations. The *Lau* Guidelines were never published in the Federal Register. Since the Department itself in its administrative decision found that RISD's departure from the *Lau* Guidelines was not determinative of the question whether the district complied with Title VI, we do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute.

We must confess to serious doubts not only about the relevance of the *Lau* Guidelines to this case but also about the continuing vitality of the rationale of the Supreme Court's opinion in *Lau* v. *Nichols* which gave rise to those guidelines. *Lau* was written prior to *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), in which the Court held that a discriminatory purpose, and not simply a disparate impact, must be shown to establish a violation of the Equal Protection Clause, and *University of California Regents* v. *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), in which, as we have already noted, a majority of the court interpreted Title VI to be coextensive with the Equal Protection Clause. Justice Brennan's opinion (in which Justices White, Marshall and Blackmun joined) in *Bakke* explicitly acknowledged that these developments raised serious questions about the vitality of *Lau.*

> We recognize that *Lau,* especially when read in light of our subsequent decision in *Washington* v. *Davis,* 426 U.S. 229 [96 S.Ct. 2040, 48 L.Ed.2d 597] (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. Id. at 352 98 S.Ct. at 2779.

Although the Supreme Court in *Bakke* did not expressly overrule *Lau,* as we noted above, we understand the clear import of *Bakke* to be that Title VI, like the Equal Protection Clause, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races. Whatever the deficiencies of the RISD's program of language remediation may be, we do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district. Thus, we think it cannot be said that the arguable inadequacies of the program render it violative of Title VI.

Plaintiffs, however, do not base their legal challenge to the district's language program solely on Title VI. They also claim that the district's current program is unlawful under § 1703(f) of the EEOA which makes it unlawful for an educational agency to fail to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." As we noted above in dissecting the meaning of § 1703(d) of the EEOA, we have very little legislative history from which to glean the Congressional intent behind the EEOA's provisions. Thus, as we did in examining § 1703(d), we shall adhere closely to the plain language of §1703 (f) in defining the meaning of this provision. Unlike subsections (a) and (e) of § 1703, § 1703(f) does not contain language that explicitly incorporates an intent requirement nor, like § 1703(d) which we construed above, does this subsection employ words such as "discrimination" whose legal definition has been understood to incorporate an intent requirement. Although we have not previously explicitly considered this question, in *Morales* v. *Shannon,* supra, we assumed that the failure of an educational agency to undertake appropriate efforts to remedy the language deficiencies of its students, regardless of whether such a failure is motivated by an intent to discriminate against those students, would violate § 1703 (f) and we think that such a construction of that subsection is most consistent with the plain meaning of the language employed in § 1703(f). Thus, although serious doubts exist about the continuing vitality of *Lau* v. *Nichols* as a judicial interpretation of the requirements of Title VI or the fourteenth amendment, the essential holding of *Lau*, i.e., that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment, in § 1703(f).[9] The difficult question presented by plaintiffs' challenge to the current language remediation programs in RISD is really whether Congress in enacting § 1703(f) intended to go beyond the essential requirement of *Lau*, that the schools do something, and impose, through the use of the term "appropriate action" a more specific obligation on state and local educational authorities.

We do not believe that Congress, at the time it adopted the EEOA, intended to require local educational authorities to adopt any particular type of language remediation program. At the same time Congress enacted the EEOA, it passed the Bilingual Education Act of 1974, 20 U.S.C. § 880b et seq. (1976). The Bilingual Educational Act established a program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. The Bilingual Education Act implicitly embodied a recognition that bilingual education programs were still in experimental stages and that a variety of programs and techniques would have to be tried before it could be determined which were most efficacious. Thus, although the Act empowered the U.S. Office of Education to develop model programs, Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own. Conf.Rep. No. 93-1026, 93d Cong., 2nd Sess. (1974), reprinted in [1974] U.S.Code Cong. & Ad.News 4093, 4206.

We note that although Congress enacted both the Bilingual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Congress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking—prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (i.e., state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators.

* * *

In a case such as this one in which the appropriateness of a particular school system's language remediation program is challenged under § 1703(f), we believe that the responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. This, of course, is not to be done with any eye toward discerning the relative merits of sound but competing bodies of expert educational opinion, for choosing between sound but competing theories is properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system. The state of the art in the area of language remediation may well be such that respected authorities legitimately differ as to the best type of educational program for limited English speaking students and we do not believe that Congress is enacting § 1703(f) intended to make the resolution of these differences the province of federal courts. The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.

The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.

Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.

With this framework to guide our analysis we now turn to review the district court's determination that the RISD's current language remediation programs were "appropriate action" within the meaning of § 1703(f). Implicit in this conclusion was a determination that the district had adequately implemented a sound program. In conducting this review, we shall consider this conclusion as a determination of a mixed question of fact and law. Therefore we shall be concerned with determining whether this conclusion was adequately supported by subsidiary findings of fact which do not appear clearly erroneous.

In this case, the plaintiffs' challenge to the appropriateness of the RISD's efforts to overcome the language barriers of its students does not rest on an argument over the soundness of the educational policy being pursued by the district, but rather on the alleged inadequacy of the program actually implemented by the district.[10] Plaintiffs contend that in three areas essential to the adequacy of a bilingual program—curriculum, staff and testing—Raymondville falls short. Plaintiffs contend that although RISD purports to offer a bilingual education program in grades K-3, the district's curriculum actually overemphasizes the development of reading and writing skills in English to the detriment of education in other areas such as mathematics and science, and that, as a result, children whose first language was Spanish emerge from the bilingual education program behind their classmates in these other areas. The record in this case does not support plaintiffs' allegation that the educational program for predominantly Spanish speaking students in grades K-3 provides significantly less attention to these other areas than does the curriculum used in the English language dominant classrooms. The bilingual education manual developed by the district outlines the basic classroom schedules for both Spanish dominant classrooms and English dominant classrooms. These schedules indicate that students in the Spanish language dominant classrooms spend almost exactly the same amount of classroom time on math, science and social studies as do their counterparts in the predominantly English speaking classrooms. The extra time that Spanish language dominant children spend on language development is drawn almost entirely from what might fairly be deemed the "extras" rather than the basic skills components of the elementary school curriculum, e.g., naps, music, creative writing and physical education.

Even if we accept this allegation as true, however, we do not think that a school system which provides limited English speaking students with a curriculum, during the early part of their school career, which has, as its primary objective, the development of literacy in English, has failed to fulfill its obligations under § 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period. The language of § 1703(f) speaks in terms of taking action "to overcome language barriers" which impede the "equal participation" of limited English speaking children in the regular instructional program. We believe the statute clearly contemplates that provision of a program placing primary emphasis on the development of English language skills would constitute "appropriate action."

Limited English speaking students entering school face a task not encountered by students who are already proficient in English. Since the number of hours in any school day is limited, some of the time which limited English speaking children will spend learning English may be devoted to other subjects by students who entered school already proficient in English. In order to be able ultimately to participate equally with the students who entered school with an English language background, the limited English speaking students will have to acquire both English language proficiency comparable to that of the average native speakers and to recoup any deficits which they may incur in other areas of the curriculum as a result of this extra expenditure of time on English language development. We understand § 1703(f) to impose on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. If no remedial action is taken to overcome the academic deficits that limited English speaking students may incur during a period of intensive language training, then the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to these students' equal participation in the regular instructional program. We also believe, however, that § 1703(f) leaves schools free to determine whether they wish to discharge these obligations simultaneously, by implementing a program designed to keep limited English speaking students at grade level in other areas of the curriculum by providing instruction in their native language at the same time that an English language development effort is pursued, or to address these problems in sequence, by focusing first on the development of English language skills and then later providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period. In short, § 1703(f) leaves schools free to determine the sequence and manner in which limited English speaking students tackle this dual challenge, so long as the schools design programs which are reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system. Therefore, we disagree with plaintiffs' assertion that a school system which chooses to focus first on English language development and later provides students with an intensive remedial program to help them catch up in other areas of the curriculum has failed to fulfill its statutory obligation under § 1703(f).

Although we therefore find no merit in the plaintiffs' claim that RISD's language remediation programs are inappropriate under §1703 because of the emphasis the curriculum allegedly places on English language development in the primary grades, we are more troubled by the plaintiffs' allegations that the district's implementation of the program has been severely deficient in the area of preparing its teachers for bilingual education. Although the plaintiffs raised this issue below and introduced evidence addressed to it, the district court made no findings on the adequacy of the teacher training program employed by RISD.[11] We begin by noting that any school district that chooses to fulfill its obligations under § 1703 by means of a bilingual education program has undertaken a responsibility to provide teachers who are able competently to teach in such a program. The record in this case indicates that some of the teachers employed in the RISD bilingual program have a very limited command of Spanish, despite completion of the TEA course. Plaintiffs' expert witness, Dr. Jose Cardenas, was one of the bilingual educators who participated in the original design of the 100 hour continuing education course given to teachers already employed in RISD in order to prepare them to teach bilingual classes. He testified that a subsequent evaluation of the program showed that although it was effective in introducing teachers to the methodology of bilingual education and preparing them to teach the cultural history and awareness components of the bilingual education program, the course, was "a dismal failure in the development of sufficient proficiency in a language other than English to qualify the people for teaching bilingual programs." Although the witnesses familiar with the bilingual teachers in the Raymondville schools did not testify quite as vividly to the program's inadequacy, testimony of those involved in the RISD's program suggested that despite completion of the 100 hour course, some of the district's English speaking teachers were inadequately prepared to teach in a bilingual classroom. Mr. Inez Ibarra, who was employed by the district as bilingual supervisor prior to his appointment to the principalship of L.C. Smith School in 1977, testified in the administrative hearing that he had observed the teachers in the bilingual program at Raymondville and that some of the teachers had difficulty communicating in Spanish in the classroom and that there were teachers in the program who taught almost exclusively in English, using Spanish, at most, one day per week. He also described the evaluation program used to determine the Spanish proficiency of the teachers at the end of the 100 hour course. Teachers were required to write a paragraph in Spanish. Since in completing this task, they were permitted to use a Spanish-English dictionary, Ibarra acknowledged that this was not a valid measure of their Spanish vocabulary. Teachers also read orally from a Spanish language text and answered oral questions addressed to them by the RISD certification committee. There was no formal grading of the examination; the certification committee had no guide to measure the Spanish language vocabulary of the teachers based on their performance on the exam. Thus, it may well have been impossible for the committee to determine whether the teachers had mastered even the 700 word vocabulary the TEA had deemed the minimum to enable a teacher to work effectively in a bilingual elementary classroom. Following the examination, the committee would have an informal discussion among themselves and decide whether or not the teacher was qualified. Mr. Ibarra testified that the certification committee had approved some teachers who were, in his opinion, in need of more training—"much more than what they were given."

The record in this case thus raises serious doubts about the actual language competency of the teachers employed in bilingual classrooms by RISD and about the degree to which the district is making a genuine effort to assess and improve the qualifications of its bilingual teachers. As in any educational program, qualified teachers are a critical component of the success of a language remediation program. A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with day-to-day responsibility for educating these children are termed "qualified" despite the fact that they operate in the classroom under their own unremedied language disability. The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot, RISD acknowledges, take the place of qualified bilingual teachers. The record in this case strongly suggests that the efforts RISD has made to overcome the language barriers confronting many of the teachers assigned to the bilingual education program are inadequate. On this record, we think a finding to the contrary would be clearly erroneous. Nor can there be any question that deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking "appropriate action" to overcome the language disabilities of its students. Although we certainly hope and expect that RISD will attempt to hire teachers who are already qualified to teach in a bilingual classroom as positions become available, we are by no means suggesting that teachers already employed by the district should be replaced or that the district is limited to hiring only teachers who are already qualified to teach in a bilingual program. We are requiring only that RISD undertake further measures to improve the ability of any teacher, whether now or hereafter employed, to teach effectively in a bilingual classroom.

On the current record, it is impossible for us to determine the extent to which the language deficiencies of some members of RISD's staff are the result of the inadequacies inherent in TEA's 100 hour program (including the 700 word requirement which may be an insufficient vocabulary) or the extent to which these deficiencies reflect a failure to master the material in that course. Therefore, on remand, the district court should attempt to identify more precisely the cause or causes of the Spanish language deficiencies experienced by some of the RISD's teachers and should require both TEA and RISD to devise an improved in-service training program and an adequate testing or evaluation procedure to assess the qualifications of teachers completing this program.[12]

The third specific area in which plaintiffs claim that RISD programs are seriously deficient is in the testing and evaluation of students having limited English proficiency. Plaintiffs claim first that the language dominance placement test used to evaluate students entering Raymondville schools is inadequate. Although it appears that at the time of the administrative hearing in this case, RISD was not employing one of the language tests approved by the TEA, by the time of the trial in this civil suit RISD had adopted a test approved for this purpose by TEA. None of plaintiffs' expert witnesses testified that this test was an inappropriate one.[13] Thus, we do not think there is any reason to believe that the district is deficient in the area of initial evaluation of students entering the bilingual program.

A more difficult question is whether the testing RISD employs to measure the progress of students in the bilingual education program is adequate. Plaintiffs contend, RISD apparently does not deny, and we agree that proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself. In their brief, plaintiffs contend that RISD's testing program is inadequate because the limited English speaking students in the bilingual program are not tested in their own language to determine their progress in areas of the curriculum other than English language literacy skills. Although during the bilingual program Spanish speaking students receive much of their instruction in these other areas in the Spanish language, the achievement level of these students is tested, in part, by the use of standardized English language achievement tests. No standardized Spanish language tests are used. Plaintiffs contend that testing the achievement levels of children, who are admittedly not yet literate in English and are receiving instruction in another language, through the use of an English language achievement test, does not meaningfully assess their achievement, any more than it does their ability, a contention with which we can scarcely disagree.

Valid testing of students' progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-a-vis that of their English speaking counterparts. Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred. The district court on remand should require both TEA and RISD to implement an adequate achievement test program for RISD in accordance with this opinion. If, following the district court's inquiry into the ability grouping practices of the district, such practices are allowed to continue, we assume that Spanish language ability tests would be employed to place students who have not yet mastered the English language satisfactorily in ability groups.

Finally plaintiffs contend that test results indicate that the limited English speaking students who participate in the district's bilingual education program do not reach a parity of achievement with students who entered school already proficient in English at any time throughout the elementary grades and that since the district's language program has failed to establish such parity, it cannot be deemed "appropriate action" under § 1703(f). Although this question was raised at the district court level, no findings were made on this claim. While under some circumstances it may be proper for a court to examine the achievement scores of students involved in a language remediation program in order to determine whether this group appears on the whole to attain parity of participation with other students, we do not think that such an inquiry is, as yet, appropriate with regard to RISD. Such an inquiry may become proper after the inadequacies in the implementation of the RISD's program, which we have identified, have been corrected and the program has operated with the benefit of these improvements for a period of time sufficient to expect meaningful results.[14]

To summarize, we affirm the district court's conclusion that RISD's bilingual education program is not violative of Title VI; however, we reverse the district court's judgment with respect to the other issues presented on appeal and we remand these issues for further proceedings not inconsistent with this opinion. Specifically, on remand, the district court is to inquire into the history of the RISD in order to determine whether, in the past, the district discriminated against Mexican-Americans, and then to consider whether the effects of any such past discrimination have been fully erased. The answers to these questions should, as we have noted in this opinion, illuminate the proper framework for assessment of the merits of the plaintiffs' claims that the ability grouping and employment practices of RISD are tainted by unlawful discrimination. If the court finds that the current record is lacking in evidence necessary to its determination of these questions, it may reopen the record and invite the parties to produce additional evidence.

The question of the legality of the district's language remediation program under 20 U.S.C. § 1703(f) is distinct from the ability grouping and teacher discrimination issues. Because an effective language remediation program is essential to the education of many students in Raymondville, we think it imperative that the district court, as soon as possible following the issuance of our mandate, conduct a hearing to identify the precise causes of the language deficiencies affecting some of the RISD teachers and to establish a time table for the parties to follow in devising and implementing a program to alleviate these deficiencies. The district court should also assure that

RISD takes whatever steps are necessary to acquire validated Spanish language achievement tests for administration to students in the bilingual program at an appropriate time during the 1981-82 academic year.

AFFIRMED in part, REVERSED in part and REMANDED.

NOTES

1. The pleadings in this case also contained an allegation that the school district had administered the extracurricular programs of its schools with the purpose and effect of denying Mexican-American students an equal opportunity to participate in such activities. The record reveals no evidence on this issue and plaintiffs have not reasserted this claim on appeal.

2. In *Burdine*, the Supreme Court elaborated upon the basic allocation of the burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment which it had enumerated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Court clarified the defendant's burden of rebuttal by describing it as follows:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.—U.S. at—, 101 S.Ct. at 1094 (footnotes omitted).

Although the Court's opinion in *Burdine* clearly disapproves of this circuit's previous practice of requiring the defendant in a Title VII case to prove the existence of legitimate non-discriminatory reasons for a challenged employment decision by a preponderance of the evidence, we do not believe that *Burdine* affects the burden shifting device we have long employed in the distinctive context of claims alleging discrimination, whether in employment or other areas, by a school district with a history of unlawful segregation. The analysis we have employed in this latter type of case is not derived from *McDonnell Douglas;* even as we employed the now disapproved "preponderance of the evidence" requirement in most Title VII contexts, we distinguished the situation where a claim of employment discrimination was lodged against a school district which formerly operated a dual school system and imposed the even stiffer "clear and convincing" standard. *Lee* v. *Conecuh County Board of Education*, 634 F.2d 959 (5th Cir. 1981). The application of this standard under these circumstances, is consistent with the type of presumptions approved by the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (in school district which formerly operated segregated dual system, burden placed on district to establish that continued existence of some one-race schools is not the result of present or past discriminatory action by the district) and *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973) ("finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious . . . and shifts to these authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.") We do not believe the Court in *Burdine* intended to affect the manner in which this court has applied a presumption similar to that recognized in *Swann* and *Keyes*, to place on school districts having a history of unlawful discrimination a more onerous burden of rebuttal in an employment discrimination case than is usually imposed on defendant in a Title VII case.

3. The record contains evidence that although Raymondville has always operated only one secondary school facility, attended by both Anglo and Mexican-American students, there was historically, segregation of Mexican-American students at the elementary school level. From school board minutes it appears that in the early decades of this century RISD operated schools on only one campus. There were separate buildings or wings of buildings on this one site for the "Mexican School" and the "American School," both of which provided instruction in the ele-

mentary grades, and the secondary school which housed junior high and high school students.

In 1947, overcrowding at the central campus prompted a proposal that RISD operate another elementary school at a different site in northwest Raymondville and to establish attendance zones for elementary students. This proposal met with organized and vocal opposition from the Mexican-American community. The League of United Latin-American Citizens petitioned the board to consider another location for the new school and complained that the proposed site coupled with the new attendance zone policy would result in the establishment of a school attended almost exclusively by Mexican-Americans. The school board nevertheless proceeded to open a school on the northwest Raymondville site. This school, known first as the San Jacinto school and later as the North Ward school, was housed in old military barracks. This school was closed and the L.C. Smith school was built on the same site in 1962. We note that although the northwest campus has apparently been a virtually all-Mexican-American school, it is not clear from the record that the main campus elementary school was ever exclusively, or even primarily, Anglo and it is certainly not so today. It is clear, however, that as a result of the manner in which attendance zones were defined, the Anglo students were concentrated at the main campus elementary school facilities. At that campus, Mexican-American students were apparently instructed in separate classes during the first three elementary grades in an effort to provide English language instruction; classrooms at the main elementary school were integrated beginning with the fourth grade. The record in this case does not contain evidence from which we can determine whether, despite this history, RISD has now fully remedied the effects of these practices and operates a unitary system.

4. We assume that the segregation resulting from a language remediation program would be minimized to the greatest extent possible and that the programs would have as a goal the integration of the Spanish-speaking student into the English language classroom as soon as possible and thus that these programs would not result in segregation that would permeate all areas of the curriculum or all grade levels

5. *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970) which set forth the standard form desegregation order in this circuit, required, inter alia, that:

> Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed and otherwise treated without regard to race, color or national origin. Id. at 1218.

6. The district court's failure to make findings regarding the history of RISD does not impair our review of the merits of plaintiff's claims that inadequacies of the district's language remediation programs render it unlawful because this claim is premised only on Title VI and the EEOA. The plaintiffs in this case do not argue that the current English language disabilities affecting some of the Mexican-American students in Raymondville are the product of past discrimination or that the district is obligated to provide bilingual education or other forms of language remediation as part of a remedy for past discrimination. Cf. *United States* v. *State of Texas*, 506 F.Supp. 405 (E.D. Tex. 1981).

7. RISD's program was apparently adopted in compliance with Tex.Ed.Code Ann. § 21.451 (Vernon 1980 Supp.) which required local school districts to provide bilingual programs for students in kindergarten through third grade. The Texas legislature, although requiring and funding bilingual education programs has, nevertheless, provided that English shall be the basic language of instruction in Texas' public schools and that bilingual education may be employed "in those situations when such instruction is necessary to insure that [students acquire] reasonable efficiency in the English language so as not to be educationally disadvantaged." Tex.Ed. Code Ann. § 21.109 (Vernon 1980 Supp.).

8. We think § 1703(f) clearly imposes on an educational agency a duty to take appropriate action to remedy the language barriers of transfer students as well as the obstacles confronting students who begin their education under the auspices of that agency. However, the challenge presented by these transfer students clearly poses a distinctive and difficult problem. Transfer students may bring to their new school varying amounts of previous education in English or another language; a school district may enroll only a few transfer students or may have a rather large revolving population of transient or migrant students who transfer in and out of the system. Factors such as these may be relevant to a determination of whether a school's language remediation program for such students is appropriate under § 1703(f). In this case, neither the pleadings nor the record in this case indicates that the distinctive problems presented and confronted by these students were addressed with the care necessary to determine whether RISD was currently taking "appropriate action" to meet their needs. Therefore we shall express no opinion on this issue in this decision.

9. In *Pennhurst State School* v. *Halderman,*—U.S.—, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), the Supreme Court was called upon to determine the meaning of § 6010(1) and (2) of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001–6080, which stated in relevant part that:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities. (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's liberty. (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution . . . that (A) does not provide treatment, services, and habilitation which are not appropriate to the needs of such person; or (B) does not meet the following minimum standards. . . . Id. at—, 101 S.Ct. at 1537.

Plaintiffs in *Pennhurst* urged, and the Court of Appeals had agreed, that this section imposed upon states an affirmative obligation to provide "appropriate treatment" for the disabled and created certain substantive rights in their favor and a private right of action to sue for protection of these rights. The Supreme Court disagreed. The Court, at the outset, analyzed the statute to determine whether Congress in enacting it had acted pursuant to § 5 of the fourteenth amendment or pursuant to the Spending Power and cautioned against implying a Congressional intent to act pursuant to § 5 of the fourteenth amendment, especially where such a construction would result in the imposition of affirmative obligations on the states. Id. at —, 101 S.Ct. 1538.

Although we are sensitive to the need for restraint recognized by the Court in *Pennhurst,* it is undisputed in this case, and indeed indisputable, that in enacting the EEOA Congress acted pursuant to the powers given it in § 5 of the fourteenth amendment. The general declaration of policy contained in § 1701 and § 1702 of the EEOA expresses Congress' intent that the Act specify certain guarantees of equal opportunity and identify remedies for violations of these guarantees pursuant to its own powers under the fourteenth amendment without modifying or diminishing the authority of the courts to enforce the provisions of that amendment.

10. The district court in its memorandum opinion observes that there was "almost total disagreement amongst the witnesses, experts and lay persons, as to the benefits of bilingual education and as to the proper method of implementing a bilingual education program if determined to be in the best interests of the students." Insofar as this statement was intended to suggest that there was uncertainty and disagreement manifested in the record about the effectiveness of the bilingual education program currently conducted in Raymondville, it is certainly correct. However, this statement should not be understood as suggesting that the record in this case presents a dispute about the value of bilingual education programs in general. The issue in this case was not the soundness or efficacy of bilingual education as an approach to language remediation, but rather the adequacy of the actual program implemented by RISD.

11. The only reference to the district's in-service teacher training program in the district court's memorandum opinion was an observation that RISD "is training non-Spanish speaking teachers in accordance with a State-administered program." This observation does not constitute a finding that this program was an adequate one, nor a finding that RISD teachers who complete the program are adequately prepared to be effective teachers in a bilingual classroom.

12. On remand, the district court should, of course, consider any improvements which may have been effected in RISD's in-service training program during the pendency of this litigation.

13. Dr. Jose Cardenas, plaintiff's principal expert witness on the subject of bilingual education, testified that he had no objection to the tests recommended by TEA for use in assessing students entering a bilingual education program. R. at 291. Mr. Inez Ibarra, employed as principal of the L.C. Smith School at the time of trial in this case and who had previously served as bilingual education supervisor for RISD, testified that RISD had adopted, for use beginning in the academic year 1978-79, the Powell Test for language placement which was "on top of the list" approved by TEA. R. at 366.

14. We note also, that even in a case where inquiry into the results of a program is timely, achievement test scores of students should not be considered the only definitive measure of a program's effectiveness in remedying language barriers. Low test scores may well reflect many obstacles to learning other than language. We have no doubt that the process of delineating the causes of differences in performance among students may well be a complicated one.